A TREATISE OF The Pleas of the Crown:

OR,

A SYSTEM of the Principal Matters relating to that SUBJECT, digested under their PROPER HEADS.

BOOK I.

By *WILLIAM HAWKINS*, Serjeant at Law.

The Third Edition, with large ADDITIONS and many hundred new REFERENCES to the Modern Books of Authority published since the Author compiled this TREATISE.

In the SAVOY:

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A

TREATISE

OF

The Plans of the Creation:

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To the Right Honourable
THOMAS Lord *PARKER*,
Baron of *MACCLESFIELD*,
Lord Chief Juſtice of *ENGLAND*.

My Lord,

THE following *Treatiſe* containing that Part of the Law, which is peculiarly under the Adminiſtration of the Chief Juſtice of *England*, I preſum'd in regard to the Subject of it, to think of preſenting it to your Lordſhip, which your Goodneſs having been pleaſed to permit, it is with the leſs Uneaſineſs that I venture to make it Publick; for I could not hope to introduce it into the Word with greater Advantage than under your Protection.

This was the real Ground of my Ambition, to dedicate it to your Lordſhip, and not to give my ſelf an Opportunity of publiſhing how much I honour thoſe wonderful Talents, that have raiſed You to ſo high a Station: A private Character indeed may be ſet forth to Advantage, and many Virtues in it be made known by an Addreſs of this Nature, which might otherwiſe have lain for ever concealed: But your Lordſhip's is Publick and Conſpicuous, and can appear no where with ſo much Luſtre as when you ſit in Judgment, where that vaſt Genius you are bleſs'd with, ſhines forth to all the World, adorn'd with all the Improvements that Humane Art can furniſh, and ſupported with the greateſt Courage and Integrity.

And nothing leſs, My Lord, could give You that Command of all the Variety of Buſineſs which comes before You, and that Facility with which You diſpatch it: The moſt intricate Points of Law, that have for Ages lain in Confuſion and Obſcurity, when they fall under your Lordſhip's Conſideration, receive ſuch Light, are ſtated and explain'd with ſuch exact Method, and ſuch Propriety and Beauty of Expreſſion, that the moſt Polite Compoſitions appear

pear not more Elegant, nor the moſt Demonſtrative more Convincing: This, My Lord, is the agreeable Part of the Exerciſe of your Authority, being no Violence to that general Humanity which you delight to ſhew to all Mankind: But the Duties of your Office require You ſometimes to put on another Character and to ſhew the awful Face of Juſtice, to curb the Rage of an unruly People, and to fright them into their Duty by the Terrors of the Law; and 'tis with Pleaſure all good Men ſee your Lordſhip purſue the prevailing Vices of the Age with ſuch Zeal and Indignation, that Crimes no longer appear leſs odious for being faſhionable, nor are the more ſecure from Puniſhment for being popular.

Theſe, My Lord, are Bleſſings which the whole Nation ſhares in, and have an Influence upon all Parts of the civil Adminiſtration: But we, who have the Honour to attend your Lordſhip at the Bar, are in a more particular Manner to acknowledge our Obligations, for that Candor and Condeſcenſion with which You treat us: The Encouragement You give to our weak Endeavours, no leſs engages our Affections, than your comprehenſive Knowledge and clear and accurate Judgment command our Reverence and Eſteem.

Such Goodneſs charms all that approach and feel it; and it was with univerſal Joy we ſaw your Lordſhip's Firmneſs to the preſent Eſtabliſhment, and great Services to your County, diſtinguiſhed lately by an Acceſſion of Honour from his Majeſty, whoſe Wiſdom in conferring his Favours has eminently appeared, by the many ſignal Benefits the Nation has received from thoſe who have the Honour to ſerve Him. I am with the greateſt Reſpect,

My LORD,

Your Lordſhip's

Moſt obliged,

And moſt Humble Servant,

William Hawkins.

THE

PREFACE.

NOTHING is more common than to hear those who have taken only a superficial View of the Crown-Law, charge it with numberless Hardships and undistinguishing Rigour; whereas those, who have more fully examin'd it, agree, that it wants nothing to make it admir'd, for Clemency and Equity, as well as Justice, but to be understood: It is so agreeable to Reason, that even those who suffer by it, cannot charge it with Injustice; so adapted to the Common Good, as to suffer no Folly to go unpunished, which that requires to be restrained; and yet so tender of the Infirmities of Human Nature, as never to refuse an Indulgence, where the Safety of the Publick will bear it; It gives the Prince no Power, but of doing Good; and restrains the People from no Liberty, but of doing Evil.

It would be needless therefore to say any Thing of the Usefulness of this Treatise, could I be so happy as any Way to come up to the Design of it, which was, to vindicate the Justice and Reasonableness of the Laws concerning criminal Matters, and to reduce them into as clear a Method, and explain them in as familiar a Manner, as the Nature of the Thing will bear.

Had any of those great Men, who formerly have written on this Subject, gone through the whole Law relating to it, all farther Attempts of this Kind had been unnecessary. The Treatise, published under the Name of Sir Matthew Hale, *is indeed very useful, and written in a clear Method, and with great Learning and Judgment; but is certainly very imperfect in the Whole, and seems to be only a Model or*

The PREFACE.

Plan of a Work of this Kind, which is ſaid to have been intended by him.

Sir Edward Coke's *third Inſtitute is alſo a Treatiſe of great Learning, and not unworthy of the Hand that produc'd it; but yet it ſeems by no Means a compleat Work, many conſiderable Heads being either wholly omitted in it, or barely touched upon.*

The Treatiſe of Sir Will. Staundforde *ſeems to be writ with great Judgment, but he takes in a very ſmall Compaſs, ſcarce mentioning any Offences under Felonies.*

As for the Treatiſes of Lambard, Crompton, Pulton, *and* Dalton, *they having an Eye chiefly to the Direction of Juſtices of Peace; and, treating of the Crown-Law no farther than as it concerns them, are far from being compleat Syſtems of it.*

Upon the whole, I apprehend that none of the Authors before mentioned were ſo perfect, but that, by reducing all the Laws relating to this Subject, under one general Scheme, they might generally be underſtood with much leſs Difficulty than they have hitherto been. This 'twas induc'd me to write on this Subject, and I hope to finiſh the Whole in two Books, propoſing in this Firſt to ſhew the Nature of criminal Offences; and in the Second, the Manner of bringing Offenders to Puniſhment.

The

The Editor's Preface.

IN this Edition Abſtracts of the Statutes made ſince the Author wrote, relating to the Subject of this Treatiſe, have been added. Care has alſo been taken to make additional References to the Reports publiſhed ſince our Author finiſhed this Work, and to Sir Matthew Hale's Hiſtoria Placitorum Coronæ. *Such References as only tend to confirm what is advanced in the Text are thrown into the Margin; but where new Points or Differences ſeemed to occur, it was thought proper to place them, together with the Abſtracts of the Statutes, by Way of Addition at the End of each Book; by which Means the learned Serjeant's Work is kept unmixed with any Thing of the Editor's, and the Pages of this Edition are made to correſpond with thoſe of the Former, ſo that References to our Author from the Modern Books may be turned to with equal Eaſe as before.*

G. L. Scott.

The PREFACE.

AN ANALYSIS OF The First BOOK OF

The Pleas of the Crown.

ALL Perſons whatſoever are liable to be puniſh'd as Criminal Offenders, unleſs they can excuſe themſelves, either,

1. In Reſpect of their Want of Reaſon: Or,
2. In Reſpect of their Subjection to the Power of others, ch. 1.

Offences, conſidered in relation to the Perſons againſt whom they are committed, are either,

1. Such as are more immediately againſt God: Or,
2. Such as are more immediately againſt Man.

Offences more immediately againſt God are either by Common Law or by Statute.

Thoſe at Common Law are either capital or not capital.

The capital are of three Kinds.

1. Hereſy, ch. 2.
2. Witchcraft, ch. 3.
3. Sodomy, ch. 4.

Thoſe not capital are either by Common Law or Statute.

Thoſe by Common Law are of five Kinds,

1. Blaſphemies againſt God, ch. 5. ſect. 1.
2. Scoffing at the Scriptures, ch. 5. ſect. 2.
3. Impoſtures in Religion, ch. 5. ſect. 3.
4. Open Lewdneſs groſly ſcandalous, ch. 5. ſect. 4.
5. Seditious Words againſt the eſtabliſhed Religion, ch. 5. ſect. 6.

Thoſe by Statute are two-fold.

1. Such as are againſt Religion in general.
2. ſuch as are againſt the eſtabliſhed Church.

Thoſe againſt Religion in general are of four Kinds.

1. Profanations of the Lord's Day, ch. 6. ſect. 1, 2, 3.
2. Profane ſwearing and Curſing, ch. 6. ſect. 4.
3. Drunkenneſs, ch. 6. ſect. 5.
4. Reviling the Lord's Supper, ch. 6. ſect. 6.

Thoſe againſt the eſtabliſhed Church are three-fold.

1. Such as concern all Perſons in general.
2. Such as more immediately relate to thoſe of the Popiſh Religion.
3. Such as more immediately regard Proteſtant Diſſenters, ch. 16.

Thoſe which concern all Perſons in general, are either,

1. Againſt the Common Prayer, ch. 7. Or,
2. In accepting or holding an Office without due Conformity to the Church, ch. 8. Or,
3. In Teaching School without conforming to the Church, ch. 9. Or,
4. In not coming to Church, ch. 10, 11.

Thoſe relating more immediately to Perſons of the Popiſh Religion, are of four Kinds,

1. Popiſh Recuſancy, ch. 12.
2. The Offence of ſaying or hearing of Maſs, or other Popiſh Service, ch. 13.
3. The Offence of not making a Declaration againſt Popery, ch. 14.
4. The Offence of promoting or encouraging the Popiſh Religion; either,
   1. In giving or receiving Popiſh Education, ch. 15. ſect. 1, 2, 3. Or,
   2. In profeſſing the Popiſh Religion, ch. 15. from ſect. 4. to ſect. 15. Or,
   3. In buying or ſelling Popiſh Books, ch. 15. ſect. 15.

Offences more immediately againſt Man are either more immediately againſt the King, or more immediately againſt the Subject.

Thoſe more immediately againſt the King are either capital or not capital.

The capital are either,

1. High Treaſon: Or,
2. Felonies.

High Treaſon is either,

1. Such as is within 25 *E.* 3. and other Statutes grounded upon it, and explaining it: Or,
2. Such as depends upon ſubſequent Statutes.

Of Treaſon within 25 *Ed.* 3. there are four Species.

1. That which immediately concerns the King, his Wife or Children, ch. 17. ſect. 3, 4, *&c.*
2. That which concerns his Office in the Adminiſtration of Juſtice, ch. 17. ſect. 46.
3. That which concerns his Seal, ch. 17. ſect. 48.
4. That which concerns his Coin, ch. 17. ſect. 54.

Of High Treaſon depending on ſubſequent Statutes, there are three Species.

1. Offences in upholding or favouring the Power of the Pope.
2. Offences againſt the Proteſtant Succeſſion, ch. 17. ſect. 85.
3. Offences in liſting Men without the King's Licence, ch. 17. ſect. 86.

Of Offences in upholding or favouring the Power of the Pope, there are five Species.

1. Extolling the Pope's Power, ch. 17. ſect. 72.
2. Putting in Ure Popiſh Bulls, ch. 17. ſect. 75.
3. Perverting others, or being perverted to Popery, ch. 17. ſect. 76.
4. Receiving Popiſh Orders or Education in Popiſh Seminaries, and not ſubmitting, *&c.* ch. 17. ſect. 79.
5. Refuſing a ſecond Tender of the Oaths, ch. 17. ſect. 84.

Felonies more immediately againſt the King are of five Kinds.

1. Offences relating to the Coin or Bullion.
2. Offences againſt the King's Council, ch. 18. ſect. 8.
3. The Offence of paſſing beyond Sea, to ſerve a Foreign Prince, ch. 18. ſect. 10.
4. The Offence of imbezilling the King's Armour, ch. 18. ſect. 12.
5. The Offence of relieving a Popiſh Prieſt, ch. 18. ſect. 14.

Of Felony relating to the Coin or Bullion, there are three Species.

1. The Offence of debaſing it, ch. 18. ſect. 1.
2. The Offence of unlawfully diminiſhing it, ch. 18. ſect. 2.
3. The Offence of endeavouring by extraordinary Means to increaſe it, ch. 18. ſect. 7.

Of Offences more immediately againſt the King, not capital, there are two Kinds.

1. *Præmunire.*
2. Miſpriſion.

Offences coming under the Notion of *Præmunire*, are either,

1. Againſt the Prerogative of the Crown: Or,
2. Againſt the Authority of the King and Parliament, ch. 19. ſect. 44.

Of Offences of this Kind againſt the Prerogative of the Crown, there are nine Species.

1. Making

1. Making uſe of Papal Bulls, ch. 19. ſect. 12.
2. Derogating from the King's Common Law Courts, ch. 19. ſect. 14.
3. Appealing to *Rome* from any of the King's Courts, ch. 19. ſect. 20.
2. Exerciſing the Juriſdiction of a Suffragan, without the Appointment of the Biſhop of the Dioceſe, ch. 19. ſect. 21.
5. Refuſing to elect or conſecrate the Perſon nominated by the King to a Biſhoprick, ch. 19. ſect. 22.
6. Maintaining the Pope's Power, ch. 19. ſect. 23.
7. Bringing in *Agnus Dei*, ch. 19. ſect. 24.
8. Contributing to the Maintenance of a Popiſh Seminary, ch. 19. ſect. 26.
9. Refuſing the Oaths, ch. 19. ſect. 27.

Miſpriſions more immediately againſt the King are either Negative or Poſitive.

The Negative is commonly called Miſpriſion of Treaſon, ch. 20.

Poſitive Miſpriſions of this kind either amount to Miſpriſion of Treaſon, or do not.

Of ſuch Miſpriſions, amounting to Miſpriſions of Treaſon, there is only one Species; forging foreign Coin not current here, ch. 20. ſect. 7.

Of ſuch Miſpriſions not amounting to Miſpriſion of Treaſon, there are four Kinds,

1. Contempts againſt the King's Palace or Courts of Juſtice, ch. 21.
2. Contempts againſt his Prerogative, ch. 22.
3. Contempts againſt his Perſon or Government, ch. 23.
4. Contempts againſt his Title, ch. 24.

Of Contempts againſt the King's Prerogative, there are three Species.

1. Refuſing to aſſiſt him for the Good of the Publick, ch. 22. ſect. 2.
2. Preferring the Intereſts of a Foreign Prince to that of our own, ch. 22. ſect. 3.
3. Diſobeying the King's lawful Commands or Prohibition, ch. 22. ſect. 4.

Of Contempts againſt the King's Perſon or Government, there are ſix Kinds.

1. Charging the Government with Oppreſſion or weak Adminiſtration, ch. 23. ſect. 2.
2. Doing an Act which impliedly encourages Rebellion, ch. 23. ſect. 4.
3. Endeavouring to frighten the King into a Change of his Meaſures, ch. 23. ſect. 4.
4. Spreading falſe Rumours concerning the King's Intentions, ch. 23. ſect. 5.
5. Charging him with a Breach of his Coronation-Oath, ch. 23. ſect. 6.
6. Speaking contemptuouſly of him, ch. 23. ſect. 7.

Of Contempts againſt the King's Title, there are two Kinds.

1. Denying his Title, ch. 24. ſect. 1.
2. Refuſing to take the Oaths required by Law for the Support of his Government.

Of Offences in refuſing to take ſuch Oaths, there are two Kinds.

1. The Offence of refuſing the Oath required by Common Law, ch. 24. ſect. 3.
2. The Offence of refuſing the Oaths required by Statute.

Of Offences in Refuſing the Oaths required by Statute, there are two Kinds,

1. The Offence of refuſing the Oaths of Allegiance and Supremacy, ch. 24. ſect. 4.
2. The Offence of refuſing the Oath of Abjuration, ch. 24. ſect. 6.

Offences more immediately againſt the Subject are either capital or not capital.

The Capital are either by the Common Law or by Statute.

Thoſe by the Common Law are committed either,

1. Againſt the Life of a Man; or,
2. Againſt his Goods; or,
3. Againſt his Habitation; or,
4. Againſt publick Juſtice.

Thoſe againſt the Life of a Man are either,

1. Caſual, not being occaſioned by the Default or Procurement of any Man, ch. 26. Or,
2. Such as come under the Notion of Homicide, being occaſioned by a Man, ch. 26. ſect. 2.

Of Homicides there are two Kinds.

1. Such as is committed againſt a Man's own Life, ch. 27.
2. Such as is committed againſt the Life of another.

Of Homicide againſt the Life of another, there be two Kinds.

1. Such as amounts not to Felony.
2. Such as amounts to Felony.

Of ſuch Homicide not amounting to Felony there are two Kinds.

1. Juſtifiable

1. Juſtifiable.
2. Excuſable.

Juſtifiable Homicide is either of a publick or a private Nature.

That of a publick Nature is of two Kinds.

1. Such as happens in the due Execution, ch. 28. ſect. 4. and
2. Such as happens in the due Advancement of publick Juſtice.

Of the latter there are two Kinds.

1. Such as happens in Criminal, ch. 28. ſect. 11. And
2. Such as happens in Civil Cauſes, ch. 28. ſect. 17.

Of juſtifiable Homicide of a private Nature there are two Kinds.

1. Such as happens in killing a Wrong-Doer, ch. 28. ſect. 21.
2. Such as happens in killing an innocent Perſon, ch. 28. ſect. 26.

Of excuſable Homicide there are two Kinds.

1. Homicide *per infortunium*, ch. 29. ſect. 1.
2. Homicide *Se defendendo*, ch. 29. ſect. 12.

Homicide againſt the Life of another, amounting to Felony, is either with or without Malice.

That which is without Malice is called Manſlaughter or Chancemedley, ch. 20.

Of ſuch Homicide with Malice there are two Kinds.

1. Murder, ch. 31.
2. Petit Treaſon, ch. 32.

Of Murder there are two Kinds.

1. Such as is done with expreſs Malice.
2. Such as is done with implied Malice.

Of Murder done with expreſs Malice, there are three Kinds.

1. Such as happens in Duelling, ch. 31. ſect. 21.
2. Such as happens in killing another without any Provocation; or but upon a ſlight one, ch. 31. ſect. 32.
3. Such as happens in killing one whom the Perſon killing intended to hurt in a leſs Degree, ch. 31. ſect. 38.

Murder done with implied Malice, generally happens in the following Inſtances.

1. Where the principal Intention is to commit another Felony, ch. 31. ſect. 41.
2. Where the principal Deſign is to commit a bare Breach of the Peace, not intended againſt the Perſon of him who happens to be ſlain, ch. 31. ſect. 46.
3. Where the chief Motive is to aſſiſt a third Perſon, ch. 31. ſect. 49.
4. Where the direct Deſign is to eſcape from an Arreſt, ch. 31. ſect. 55.
5. Where the principal Purpoſe is to uſurp an illegal Authority, ch. 31. ſect. 59.
6. Where no Miſchief is intended at all, ch. 31. ſect. 61.

Of Petit Treaſon there are three Kinds, ch. 32.

1. Where a Servant kills his Maſter.
2. Where a Wife kills her Husband.
3. Where an Eccleſiaſtical Perſon kills his Prelate.

Of capital Offences at Common Law againſt the Goods of another, there are two Kinds.

1. Simple Larceny.
2. Mix'd Larceny.

Of ſimple Larceny there are alſo two Kinds.

1. Grand Larceny, ch. 32. ſect. 1.
2. Petit Larceny, ch. 32. ſect. 31.

Mix'd Larceny is either from the Perſon of a Man, or from his Houſe, ch. 36.

Of mix'd Larceny from the Perſon there are two Kinds.

1. Robbery, ch. 34.
2. Larceny from the Perſon, ch. 35.

Alſo there is another Offence of this Nature call'd Piracy, ch. 37.

Capital Offences at Common Law againſt the Habitation of a Man are of two Kinds.

1. Burglary, ch. 38.
2. Arſon, ch. 39.

Offences more immediately againſt the Subject, made capital by Statute, are ſuch as are committed.

1. Againſt Women, (and of theſe there are two Kinds.
   1. Rape.
   2. Forcible Marriage.)
2. Againſt the Rights of Marriage, ch. 43.

3. Againſt

3. Againſt the Members of a Man's Body, ch. 44.
4. Againſt Records, ch. 45.
5. Againſt Cattle, ch. 46.
6. By Purveyors, ch. 47.
7. By Soldiers and Mariners, ch. 48.
8. By Hunters, ch. 49.
9. By Forgers of falſe Deeds, ch. 50.
10. By Gaolers, ch. 51.
11. By Tranſporters of Sheep or Wool, ch. 52.
12. By Servants, ch. 53.
13. By *Egyptians*, ch. 54.
14. By Cutters of Pow-dike, ch. 55.
15. By Treſpaſſers on the Borders, and Rioters, ch. 56.
16. By Bankrupts, ch. 57.
17. By Counterfeiters of Bank-Notes, Exchequer-Bills, Stamps, South-Sea Bonds, Lottery-Orders, &c. ch. 58.

Offences more immediately againſt the Subject not capital, are of two Kinds.

1. Miſpriſion of Felony, ch. 59.
2. Other inferior Offences.

Such inferior Offences are of two Kinds.

1. Such as amount to an actual Diſturbance of the Peace.
2. Such as do not amount to ſuch a Diſturbance.

For the Prevention of the former of theſe Kinds of Offences, the Law has provided two Remedies.

1. By Surety for keeping the Peace, ch. 60.
2. By Surety for the good Behaviour, ch. 61.

Of the abovementioned Offences amounting to the actual Diſturbance of the Peace, there are two Kinds.

1. Such as may be committed by one or two Perſons.
2. Such as require a greater Number.

Of thoſe which may be committed by one or two Perſons there are four Kinds.

1. Aſſaults, ch. 62. ſect. 1.
2. Batteries, ch. 62. ſect. 2.
3. Affrays, ch. 63.
4. Forcible Entries and Detainers, ch. 64.

Of thoſe, which require a greater Number of Perſons, there are three Kinds.

1. Riots, ch. 65. ſect. 1.
2. Routs, ch. 65. ſect. 8.
3. Unlawful Aſſemblies, ch. 65. ſect. 9.

Of ſuch inferior Offences not amounting to an actual Diſturbance of the Peace, there are two Kinds.

1. Such as are committed by Officers.
2. Such as are committed by common Perſons without any Relation to an Office.

Of Offences of this Nature committed by Officers, there are three Species.

1. Neglect or Breach of Duty, ch. 66.
2. Bribery, ch. 67.
3. Extortion, ch. 68.

Of Offences of this Nature, committed by private Perſons, without any relation to any Office, there are two Kinds.

1. Such as are infamous and groſly ſcandalor, proceeding from Principles of down-right Diſhoneſty, Malice or Faction.
2. Such as are of an inferior Nature, and neither infamous nor groſly ſcandalous.

Of Offences of the firſt Sort, there are ſix Species.

1. Perjury, ch. 69.
2. Forgery, ch. 70.
3. Cheats, ch. 71.
4. Conſpiracy, ch. 72.
5. Libels, ch. 73.
6. Keeping of a Bawdy-houſe, ch. 74.

Of Offences of the latter Sort there are two Kinds.

1. Such as more immediately affect the Publick.
2. Such as more immediately affect the Intereſts of particular Perſons.

Of thoſe which more immediately affect the Publick, there are four Kinds.

1. Common Nuſances, ch. 75.
2. Monopolies, ch. 79.
3. Foreſtalling, Ingroſſing, and Regrating, ch. 80.
4. Barratry, ch. 81.

The moſt remarkable Kinds of common Nuſances are,

1. Such as relate to Highways.
2. Such as relate to Publick Houſes, ch. 78.

Thoſe which relate to Highways come under a two-fold Conſideration.

1. As they relate to Highways in general, ch. 76.
2. As they relate to Bridges in particular, ch. 77.

Of the Offences above-mentioned more immediately affecting the Intereſts of particular Perſons there are three Kinds.

1. Uſury, ch. 82.
2. Maintenance.
3. Buying or ſelling a pretended Title, ch. 86.

Maintenance is two-fold.

1. *Ruralis*, ch. 63. ſect. 2.
2. *Curialis*, ch. 83. ſect. 3.

Of Maintenance *Curialis* there are three Species.

1. General Maintenance, ch. 83. ſect. 4.
2. Champerty, ch. 84.
3. Embracery, ch. 85.

AN

An Account of the Authors referred to in this Book.

A.

A Leyn	*A Leyn's Reports.*
And. 1, 2.	*Anderſon's Reports, firſt and ſecond Part.*
Aſſ. 1, 2, 3, 4, &c.	*The Book of Aſſizes in the Reign of King Edward the third, for the firſt, ſecond, third, fourth Years, &c.*

B.

Barrow	*Barrow's Supremacy.*
Benloe	*Benloe's Reports.*
Brac. Bracton	*Bracton, De legibus & conſuetudinibus Angliæ.*
Bridg.	*Bridgman's Reports.*
Bro.	*Brook's Abridgment.*
Bul. 1, 2, 3.	*Bulſtrode's Reports, the firſt, ſecond and third Part.*

C.

Carth.	*Carthew's Reports.*
Caſes in Parliament	*Sir Bartholomew Shower's Caſes in Parliament.*
Caw. Cawley	*Cawley's Law againſt Recuſants.*
Co. 1, 2, &c.	*Sir Edward Coke's Reports, the firſt and ſecond Part, &c.*
Co. Litt.	*Sir Edward Coke's Commentary upon Littleton.*
Comb.	*Comberbach's Reports.*
Cro. E.	*Croke's Reports for the Reign of Queen Elizabeth.*
Cro. Ja.	*Croke's Reports for the Reign of King James the firſt.*
Cro. Ca.	*Croke's Reports for the Reign of King Charles the firſt.*
Crom.	*Crompton's Office of a Juſtice of Peace, printed in the Year* 1606.

D.

Daliſ.	*Daliſon's Reports.*
Dalt.	*Dalton's Country Juſtice, printed in the Year* 1655.
Danv. Abr. 1, 2, 3.	*D'Anver's Abridgment, firſt, ſecond and third Part.*
Dav. Davis	*Davis's Reports.*
Dy. Dyer	*Dyer's Reports.*

F.

F. N. B.	*Fitzherbert's Natura Brevium.*
Fitz.	*Fitzherbert's Abridgment.*
Far.	*Farreſley's Reports.*

G.

Gibſ. Gibſon	*Gibſon's Codex Juris Eccleſiaſtici Anglicani.*
Godb.	*Godbolt's Reports.*

H.

1, 2 H. H. P. C.	*Hale's Hiſtoria Placitorum Coronæ, firſt and ſecond Vol.*
H. P. C.	*Hale's Pleas of the Crown.*
Hard.	*Hardreſs's Reports.*
Hetl.	*Hetley's Reports.*
Hob.	*Hobart's Reports.*
Hutt.	*Hutton's Reports.*

J.

1 Jon. Sir Wm. Jon.	*Sir William Jones's Reports.*
2 Jon.	*Sir Thomas Jones's Reports.*
1 Inſt.	*Coke upon Littleton.*
2 Inſt.	*The ſecond Part of Coke's Inſtitutes.*
3 Inſt.	*The third Part of Coke's Inſtitutes.*
4 Inſt.	*The fourth Part of Coke's Inſtitutes.*

K.

Keb. 1, 2, 3.	*Keble's Reports, the first, second, and third Part.*
Kell.	*Kellewey's Reports.*
Kelyng, Keyl.	*Kelyng's Reports.*
Kitch.	*Kitchin, of Courts-Leet and Courts-Baron.*

L.

Lam. Lamb.	*Lambard's Office of Justices of Peace, printed in the Year* 1614.
Lane	*Lane's Reports.*
Latch	*Latch's Reports.*
Leon. 1, 2, 3, 4.	*Leonard's Reports, the first, second, &c. Part.*
Lev. 1, 2,	*Levinz's Reports, the first and second Part.*
Litt.	*Littleton's Reports.*

M.

Mar.	*March's Reports.*
Mod. 1, 2, 3, &c.	*Modern Reports, first, second, and third Part, &c.*
Mo.	*Moore's Reports.*

N.

New Abr.	*New Abridgment of the Law.*
Noy	*Noy's Reports.*

O.

Ow. Owen.	*Owen's Reports.*

P.

Pal. Palm.	*Palmer's Reports.*
Parsons	*Parsons against Sir Edward Coke's fifth Report.*
Pl. Com.	*Plowden's Commentaries.*
Po. Poph.	*Popham's Reports.*
Pult.	*Pulton, De Pace Regis & Regni.*

R.

Ray. Raym.	*Raymond's Reports.*
Reg.	*Register.*
R. A. Rol. Ab. 1, 2.	*Rolle's Abridgment, the first and second Part.*
R. R. Rol. Re. 1, 2.	*Rolle's Reports, the first and second Part.*
Rushw. Coll.	*Rushworth's Collections.*

S.

Salk.	*Salkeld's Reports.*
Saun. 1, 2.	*Saunder's Reports, the first and second Part.*
Sav.	*Savil's Reports.*
Selden's Janus Anglorum	*Jani Anglorum facies altera by Mr. Selden, translated into English by Redman Westcot, and printed in the Year* 1682.
Selden's Epinomis	*England's Epinomis by Mr. Selden, printed in the Year* 1683.
Shower	*Shower's Reports.*
Sid. Syd. 1, 2.	*Siderfin's Reports, the first and second.*
Skin.	*Skinner's Reports.*
St. Tr. Vol. 1, 2, &c.	*State Trials, Vol.* 1, 2, *&c. first Edition.*
S. P. C.	*Staundeford's Pleas of the Crown.*

T.

Thelo.	*Theloal's Digest of Writs.*
Trem.	*Tremaine's Pleas of the Crown.*

V.

Vaugh.	*Vaughan's Reports.*
Vent. 1, 2.	*Ventris's Reports, the first and second Part.*

W.

Watf. Watfon	*Watson's Clergy-man's Law, Folio Edition.*
Win. Winch	*Winch's Reports.*
Wood's Inf.	*Wood's new Institute of the Imperial or Civil Law.*

Y.

Year Books.	
Yel.	*Yelverton's Reports.*

A TREATISE OF The Pleas of the Crown.

BOOK I.

CHAP. I.

Of the Perſons who may be guilty of criminal Offences.

THE Guilt of offending againſt any Law whatſoever, neceſſarily ſuppoſing a wilful Diſobedience, can never juſtly be imputed to thoſe, who are either uncapable of underſtanding it, or of conforming themſelves to it: Therefore, before I come to the ſeveral Kinds of Offences, I ſhall ſhew what Degrees of Diſcretion and Freedom are required in the Commiſſion of them; for the better Underſtanding whereof, I ſhall conſider what Offenders are excuſable,

1. In reſpect of their Want of Reaſon;
2. In reſpect of their Subjection to the Power of others.

Sect. 1. As to the firſt Point it is to be obſerved, [a] That thoſe who are under a natural Diſability of diſtinguiſhing between Good and Evil, as Infants under the Age of Diſcretion, Ideots and Lunaticks, are not puniſhable by any criminal Proſecution whatſoever. [1]

Sect. 2. Indeed it was [b] anciently holden, in Reſpect of that high * Regard which the Law has for the Safety of the King's Perſon, That a Madman might be puniſh'd as a Traitor, for killing or offering to kill the King; but this is [c] contradicted by the later Opinions.

Sect. 3. And it ſeems agreed at this [d] Day, That if one, who has committed a capital Offence, become *Non Compos* before Conviction, he ſhall not be arraigned; and if after Conviction, that he ſhall not be executed.

Sect. 4. But by 12 *Annæ*, 23. which ſeems to be agreeable to the [e] ancient Common Law, a dangerous Madman may be kept in Priſon till he recover his Senſes; and by the Common Law, if it be doubtful whether a Criminal, who at his Trial is in [f] appearance a Lunatick, be ſuch in Truth or not, it ſhall be tried by an Inqueſt of Office, to be returned by the Sheriff of the County wherein the Court ſits; and if it be found by them that the Party only feigns himſelf mad, [g] and he ſtill refuſe to anſwer, he ſhall be dealt with as one that ſtands mute.

Sect. 5. And if one who wants Diſcretion commit a [h] Treſpaſs againſt the Perſon or Poſſeſſion of another, he ſhall be compelled in a civil Action to give Satisfaction for the Damage.

Sect. 6. And he who is guilty of any Crime whatever, thro' his [i] voluntary Drunkenneſs, ſhall be puniſhed for it as much as if he had been ſober.

Sect. 7. Alſo he, who incites a Madman to do a Murder or other Crime, is a [k] principal Offender, and as much puniſhable as if he had done it himſelf.

Sect. 8. And if it appear by the Circumſtances, that an Infant under the Age of Diſcretion could [l] diſtinguiſh between Good and Evil, as if one of the Age of nine or ten Years kill another, and hide the Body, or make Excuſes, or hide himſelf, he may be convicted and condemned, and forfeit, *&c.* as much as if he were of full Age. But in ſuch a Caſe the Judges will in Prudence reſpite the Execution in order to get a Pardon: And it is ſaid, That if an Infant apparently wanting Diſcretion be indicted and found guilty of Felony, the Juſtices themſelves may diſmiſs him without a Pardon, *&c.*

As to the ſecond Point, *viz.* How far thoſe are to be excuſed who are under the Power of others:

Sect. 9. 1. A Feme Covert is ſo much favoured in Reſpect of that Power and Authority which her Husband has over her, that ſhe ſhall not ſuffer any Puniſhment for committing a bare [m] Theft in Company with, or by Coercion of, her Husband.

Sect. 10. Neither ſhall ſhe be deemed acceſſary [n] to a Felony for receiving her Husband who has been guilty of it, as her Husband ſhall be for receiving her.

Sect. 11. But if ſhe commit a Theft of her own voluntary [o] Act, or by the bare Command of her Husband; or be guilty of Treaſon, Murder or Robbery, in Company with, or by Coercion of, her Husband, ſhe is puniſhable as much as if ſhe were Sole.

Sect. 12. Alſo a Wife may be indicted together with her Husband, and condemned to the Pillory with him for keeping a Bawdy-houſe; for this is an Offence as to the Government of the Houſe, in which the

[a] H. P. C. 10, 43, 65. Plut. 122. b. Dalt. cap. 95. Bro. Coron. 6, 61, 136, 170, 217.
[b] 3 H. 7. 1. b. See 1 Hale's Hiſtory P. C. 16, 17, &c. 4 Co. 124. b. 2 Rol. Rep. 324.
* Lunatick pardoned Regiſt. 309. Fitz. Cor. 351.
[c] 3 Inſt. 46. H. P. C. 10, 43. Co. Lit. 247. 1 H. H. P. C. 36, 37.
[d] H. P. C. 10. 3 Inſt. 4, 6. 1 And. 107, 109. 26 Aſſ. Pl. 27. Sav. 50, 57. 1 H. H. P. C. 34, 35.
[e] 26 Aſſ. Pl. 27. Bro. Coron. 101. 1 H. H. P. C. 35.
[f] 1 And. 107. Sav. 50. 1 H. H. P. C. 35.
[g] H. P. C. 226. Sav. 56.
[h] 2 R. A. 547. Pl. 4. Hob. 134. 35 H. 6. 11. b. Co. Lit. 247. b. Bro. Coron. 6. Dalt. ca. 95. 1 H. H. P. C. 15, 16.
[i] Co. Lit. 247. 1 H. H. P. C. 32. Plowd. 19. a.
[k] H. P. C. 43, 44. Keyl. 53. Dalt. ca. 95. 1 H. H. P. C. 617.
[l] H. P. C. 43. 12 Aſſ. Pl. 30. 3 H. 7. 1. b. 12. b. Bro. Coron. 74, 133. 3 H. 7. 1. b. 12. b. S. P. C. 16. F. H. P. C. 35. 35 H. 6. 11. b. Bro. Coron. 6, 61. 1 H. H. P. C. 26, 27, 434, 569, 570. Infant under ſeven pardoned, Regiſt. 309. b.
[m] Keyl. 31. S. P. C. 26. c. 142. c. 27 Aſſ. 40. H. P. C. 65. 1 H. H. P. C. 45.
[n] 3 Inſt. 108. H. P. C. 65. 1 H. H. P. C. 44, 45.
[o] H. P. C. 65. Dalt. ca. 104. 27 Aſſ. Pl. 40. Fitz. Coro. 199. B. 2 Ch. 29. S. 34. Queen and Williams, Mich. 10 Annæ. 1 Salk. 384.

Wife has a principal Share; and alſo ſuch an Offence as may generally be preſumed to be managed by the Intrigues of her Sex.

Sect. 13. And generally [a] a Feme Covert ſhall anſwer as much as if ſhe were Sole, for any Offence, not capital, againſt the Common Law, or Statute; and (if it be of ſuch a Nature that it may be committed by her alone, without the Concurrence of the Husband) ſhe may be puniſhed for it without the Husband, by Way of Indictment, which being a Proceeding grounded merely on the Breach of the Law, the Husband ſhall not be included in it for an Offence to which he is no way privy. And [b] if a Woman bring a malicious Appeal for the Death of her Husband, known by her to be alive, ſhe may be impriſoned for her falſe Appeal, till ſhe make [c] Fine to the King, and the Husband ſhall go at large. But if a Wife incur the Forfeiture of a penal Statute, * the Husband may be made a Party to an Action or Information for the ſame, (as he may be generally to any Suit for a Cauſe of Action given by his Wife,) and ſhall be liable to anſwer what ſhall be recovered thereon.

Sect. 14. 2. Neither [d] a Son, nor a Servant, are excuſed the Commiſſion of any Crime, whether capital of not capital, by the Command or Coercion of the Father or Maſter. [2]

[a] 9 Co. 71. Con. Mo. 813. 1 Sid. 410. 2 Keb. 634. Vide Hob. 93. Noy 103. Savil 25. 1 Rol. Rep. 93, 94, 233, 234. Cro. Ja. 482. 11 Co. 61. b. 62.

[b] 8 H. 4. 17. Pl. 2 Fitz. Coro. 73. Bro. Impriſonm. 100.

[c] See the Citations to Letter a.

* Infra Ch. 10. Sect. 31, 39.

[d] 3 Keb. 34. H. P. C. 66. Moor 813. 1 H. H. P. C. 44.

CHAP. II.

Of Hereſy.

OFFENCES conſidered in Relation to the Perſons againſt whom they are committed, are either,

1. Such as are more immediately againſt God; or,
2. Such as are more immediately againſt Man.

Offences more immediately againſt God are either by Common Law, or by Statute.

Thoſe at Common Law are either capital, or not capital. The capital Offences of this Nature are of three Kinds:

1. Hereſy.
2. Witchcraft.
3. Sodomy.

Concerning Hereſy I ſhall conſider,

See 1 H. H. P. C. 383 to 410.

1. What it is;
2. By whom it is cognizable;
3. How it is puniſhable.

Sect. 1. As to the firſt Point it ſeems, That among Proteſtants Hereſy is taken to be a falſe Opinion repugnant to ſome Point of Doctrine clearly revealed in Scripture, and either abſolutely eſſential to the Chriſtian Faith, or at leaſt of moſt high Importance.

Sect. 2. But it is impoſſible to ſet down all the particular Errors which may properly be called Heretical, concerning which there are, and

and always have been, ſo many intricate Diſputes; However the 1 *El.* 1. which erected the High-Commiſſion-Court, having reſtrained the ſame from adjudging any Points to be Heretical, which have not been determined to be ſuch either by Scripture, or by ſome one of the four firſt General Councils, or by ſome other Council, by expreſs Words of Scripture, or by the Parliament with the Aſſent of the Convocation, it has been ſince generally holden, that theſe Rules will be good Directions to Eccleſiaſtical Courts in Relation to Hereſy.

3 Inſt. 40. H. P. C. 3.

Sect. 3. As to the ſecond Point, *viz.* By whom Hereſy is cognizable, it is certain, That the Convocation may declare what Opinions are Heretical: But it hath been queſtioned of late, Whether they have Power at this Day to convene and convict the Heretick?

See Bro. Hereſy. 2 Roll. Ab. 226.

Sect. 4. However it is agreed, That every Biſhop may convict Perſons of Hereſy, within his own Dioceſe, and proceed by Church-Cenſures againſt thoſe who ſhall be convicted; but it is ſaid, That no Spiritual Judge, who is not a Biſhop, hath this Power; and it has been queſtioned, Whether a Conviction before the Ordinary were a ſufficient Foundation whereon to ground the Writ *de Hæretico comburendo*, as it is agreed that a Conviction before the Convocation was?

F. N. B. 269. 12 Co. 56, 57. 3 Inſt. 40. H. P. C. 5. Gibſon 401, 410. 12 Co. 56, 57, 93. 3 Inſt. 40.

Sect. 5. By 24 *H.* 8. 9. the Archbiſhop of either Province may cite any Perſon before him for Hereſy, if the immediate Ordinary either conſent thereto, or do not his Duty in puniſhing the ſame.

Sect. 6. But it is certain, that a Man cannot be proceeded againſt at the Common Law in a Temporal Court merely for Hereſy; yet if in Maintenance of his Errors he ſet up Conventicles and raiſe Factions, which may tend to the Diſturbance of the publick Peace, it ſeemeth that he may in this Reſpect be fined and impriſoned upon an Indictment, *&c.* at the Common Law.

27 H. 8. 14. b. 5 Co. 58. a. H. P. C. 4. Hob. 236.

Sect. 7. Alſo a Temporal Judge may incidently take Knowledge whether a Tenet be Heretical or not; as where one was committed by Force of 2 *H.* 4. 5. for ſaying, that he was not bound by the Law of God to pay Tithes to the Curate: And another for ſaying, That though he was excommunicate before Men, yet he was not ſo before God. The Temporal Courts, on an *Habeas Corpus* in the firſt Caſe, and an Action of falſe Impriſonment in the other, adjudged neither of the Points to be Hereſy within that Statute; for the King's Courts will examine all Things which are ordained by Statute.

H. P. C. 4. 1 H. H. P. C. 399, 400. 3 Inſt. 42. 1 Ro. Re. 110. 2 Bulſt. 300.

Sect. 8. Alſo in a *Quare impedit*, if the Biſhop plead that he refuſed the Clerk for Hereſy, it ſeems that he muſt ſet forth the particular Point, that it may appear to be Heretical to the Court wherein the Action is brought, which having Conuſance of the original Cauſe muſt by Conſequence have a Power as to all incidental Matters neceſſary for the Determination of it; and, without knowing the very Point alledged againſt the Clerk, will not be able to give Directions concerning it to the Jury, who (if the Party be dead) are to try the Truth of the Allegation.

5 Co. 58. 1 And. 191. 2 Leon. 199. 3 Lev. 314. 1 H. H. P. C. 407, 408.

Sect. 9. But if a Man be proceeded againſt as an Heretick in the Spiritual Court *pro ſalute animæ*, and think himſelf aggrieved, his proper Remedy ſeems to be to bring his Appeal to a higher Eccleſiaſtical Court, and not to move for a Prohibition from a Temporal one, which, as it ſeems to be agreed, cannot regularly determine or diſcuſs, what ſhall be called Hereſy.

5 Co. 58. a. 27 H. 8. 14. b.

Sect. 10. As to the third Point, *viz.* How Hereſy is puniſhable; there is no Doubt but that at Common Law one convicted thereof, and refuſing to abjure it, or falling into it again after he had abjured it,

F. N. B. 269. 3 Inſt. 43. H. P. C. 5.

might be burnt by Force of the Writ *de Hæretico comburendo*, which was grantable out of Chancery upon a Certificate of ſuch Conviction; but it is ſaid, That he forfeited neither Lands nor Goods, becauſe the proceedings againſt him were only *pro ſalute animæ*. Doctor and Student, lib. 3. ca. 29. H. P. C. 5.

Sect. 11. But at this Day the ſaid Writ *de Hæretico comburendo* is aboliſhed by 29 *Car.* 2. 9. And all the old Statutes which give a Power to arreſt or impriſon Perſons for Hereſy, or introduced any Forfeiture on that Account, are repealed; yet by the Common Law an obſtinate Heretick being excommunicate, is ſtill liable to be impriſoned by Force of the Writ *de Excommunicato capiendo*, till he make Satisfaction to the Church. And by 9 & 10 *Will.* 3. 32. *If any Perſon having been educated in, or having made Profeſſion of the Chriſtian Religion within this Realm, ſhall be convicted in any of the Courts of* Weſtminſter, *or at the Aſſizes, of denying any one of the Perſons in the Holy Trinity to be God, or of maintaining that there are more Gods than one, or of denying the Truth of the Chriſtian Religion, or the Divine Authority of the Holy Scriptures, he ſhall for the firſt Offence be adjudged uncapable of any Office; and for the ſecond, ſhall be diſabled to ſue any Action, or to be a Guardian, Executor or Adminiſtrator, or to take by any Legacy or Deed of Gift, or to bear any Office Civil or Military, or Benefice Eccleſiaſtical, for ever, and ſhall alſo ſuffer Impriſonment for three Years, without Bail or Mainprize, from the Time of ſuch Conviction.* H. P. C. 4, 5. 12 Co. 44.

CHAP. III.

Of Witchcraft.

Sect. 1. OF Offenders of this Nature there are ſaid to be three Kinds, 3 Inſt. 44. Dalt. ca. 107.

1. Conjurers, who by Force of certain Magick Words endeavour to raiſe the Devil, and compel him to execute their Commands.

2. Witches, who by Way of friendly Conference are ſaid to bargain with an evil Spirit to do what they deſire of him.

3. Sorcerers or Charmers, who by the Uſe of certain ſuperſtitious Forms of Words, or by Means of Images, or other odd Repreſentations of Perſons or Things, &c. are ſaid to produce ſtrange Effects above the ordinary Courſe of Nature.

Sect. 2. All theſe were anciently puniſhed in the ſame Manner as Hereticks, by the Writ *de Hæretico comburendo* after a Sentence in the Eccleſiaſtical Court, and a Relapſe. And it is ſaid alſo, That they might be condemned to the Pillory, &c. upon an Indictment at Common Law. 3 Inſt. 44. F.N.B.269.b. H. P. C. 6. S. P. C. 38. g. Cro. Eliz. 571.

Sect. 3. In the Time of King *Edward* the third, one taken with the Head and Face of a dead Man, and a Book of Sorcery, was brought into the King's Bench: But there being no Indictment againſt him, he was ſworn that from thenceforth he would not be a Sorcerer, and then delivered from Priſon, and the Head was burnt at his Charge: But this Method ſeems to be obſolete at this Day. 1 H. H. P. C. 383. 45 Ed. 3. 17. b. Bro. Cor. 15. 2 Keb. 719.

Sect. 4. By 1 *Jac.* 1. *cap.* 12. the only Law now in Force againſt theſe Offenders, they are divided into two Degrees; and thoſe in the firſt Degree, and their Acceſſaries before, ſhall ſuffer as Felons without Clergy; and of theſe there are the four following Species.

H. P. C. 6. 3 Inſt. 45. con. 1. *Such as ſhall uſe any Invocation or Conjuration of any evil Spirit:* And ſuch ſeem clearly to be within the Law, tho' no Spirit do actually appear.

H. P. C. 6. 3 Inſt. 45. 2. *Such as conſult, covenant with, entertain, employ, feed, or reward any evil Spirit to any Intent:* And theſe are agreed to be within the Statute, though nothing farther be done upon ſuch Conſultation, &c.

H. P. C. 6. 3 Inſt. 45. 3. *Such as take up any dead Perſon's Body, or any Part thereof, to be uſed in any Manner of Witchcraft:* And theſe are alſo clearly within the Statute, though they do not actually ſo uſe it.

H. P. C. 7. 3 Inſt. 45. 1 Jon. 143. 4. *Such as exerciſe any Witchcraft, Inchantment, Charm or Sorcery, whereby any Perſon ſhall be killed, deſtroyed, conſumed, or lamed in his or her Body, or any Part thereof:* But none are within this Branch who do not actually effect ſuch Miſchief.

Sect. 5. Thoſe in the ſecond Degree ſhall for the firſt Offence ſuffer a a Year's Impriſonment, and the Pillory; and for the ſecond, as Felons without Clergy, and theſe by the manifeſt Purport of the Words of the Act, which is very obſcurely penned, ſeem to be divided into the two following Species.

1. *Such as take upon them by Withcraft, Inchantment, Charm or Sorcery, to tell where Treaſure is to be found, or where Things loſt or ſtolen may be found, or to do any Thing to the Intent to provoke any Perſon to unlawful Love, or to hurt or deſtroy any Perſon in his or her Body, though the ſame be not effected.*

H. P. C. 8. 3 Inſt. 46. 2. *Such as ſhall uſe any Witchcraft*, &c. *whereby any Cattle or Goods of any Perſon ſhall be deſtroyed, waſted or impaired:* But thoſe, who take upon them to do this, are not within the Act unleſs they actually do it. [3]

CHAP. IV.

Of Sodomy.

12 Co. 36, 37. 3 Inſt. 58. *Sect.* 1. ALL unnatural Carnal Copulations, whether with Man or Beaſt, ſeem to come under the Notion of Sodomy, which was Felony by the ancient Common Law, and puniſh'd, according to ſome Authors, with Burning; according to others, with Burying alive: But at this Day by Force of 25 *H.* 8. 6. & 5 *El.* 17. is puniſhed in the ſame Manner as other Felonies, which are excluded from Clergy.

12 Co. 36, 37. 3 Inſt. 58. But Quære, and See 1 H. H. P. C. 628. and Ld. Audley's Caſe in State Trials. *Sect.* 2. In every Indictment for this Offence, there muſt be the Words *Rem habuit veneream & carnaliter cognovit*; and conſequently ſome Kind of Penetration, and alſo of Emiſſion, muſt be proved; but any the leaſt Degree is ſufficient, and Emiſſion is *prima facie* an Evidence of Penetration.

CHAP. V.

Of Offences againſt God not Capital at Common Law.

OFFENCES more immediately againſt God not Capital, are either by the Common Law or Statute.

Thoſe by the Common Law are,

1 Ven. 293. 3 Keb. 607, 621. *Sect.* 1. I. All Blaſphemies againſt God, as denying his Being or Providence, and all contumelious Reproaches of Jeſus Chriſt.

Sect. 2. II. All profane Scoffing at the Holy Scripture, or expoſing any Part thereof to Contempt or Ridicule.

Sect. 3. III. Impoſtures in Religion, as falſly pretending to extraordinary Commiſſions from God, and terrifying or abuſing the People with falſe Denunciations of Judgments, &c. See the Caſe of James Nailor, and of the French Prophets, &c. 1 Sid. 168. 1 Keb. 620.

Sect. 4. IV. All open Lewdneſs groſly ſcandalous, ſuch as was that of thoſe Perſons, who expoſed themſelves naked to the People in a Balcony in *Covent-Garden* with moſt abominable Circumſtances.

Sect. 5. Offences of this Nature, becauſe they tend to ſubvert all Religion or Morality, which are the Foundation of Government, are puniſhable by the Temporal Judges with Fine and Impriſonment, and alſo ſuch corporal infamous Puniſhment as to the Court in Diſcretion ſhall ſeem meet, according to the Heinouſneſs of the Crime. 1 Ven. 293. 3 Keb. 607, 621.

Sect. 6. V. Seditious Words in Derogation of the Eſtabliſhed Religion are indictable, as tending to a Breach of the Peace; as theſe, Your Religion is a new Religion, and Preaching is but Prattling, and Prayer once a Day is more edifying. 2 R. A. 187. Pl. 1. Cro. Ja. 421.

CHAP. VI.

Of Offences by Statute againſt Religion in general.

OFFENCES by Statute not Capital more immediately againſt God, are either,

1. Such as are againſt Religion in general; or,
2. Such as are againſt the Eſtabliſhed Church.

Thoſe againſt Religion in general are of ſeveral Kinds; as

Sect. 1. I. All Profanation of the Lord's Day; for by 1 *Car.* 1. 1. *There ſhall be no Aſſembly of People, out of their own Pariſhes, on this Day, for any Sport whatſoever; nor any Bull-baiting or Bear-baiting, Interludes, common Plays, or other unlawful Exerciſes and Paſtimes, uſed by any Perſons in their own Pariſhes, on Pain that every Offender ſhall forfeit* 3 s. *and* 4 d. *to the Uſe of the Poor*, &c.

Sect. 2. By 29 *Car.* 2. 7. *No Perſons whatſoever, above fourteen Years old, ſhall exerciſe any worldly Labour, Buſineſs, or Work of their ordinary Calling on the Lord's Day, (except Works of Neceſſity and Charity, and the Dreſſing and Selling of Meat in an Inn and Victualling Houſe, for thoſe who cannot otherwiſe be provided,) on Pain of forfeiting* 5 s. *And no Perſon ſhall publickly cry, or expoſe to Sale, any Goods whatſoever on this Day, (except Milk, which may be ſold before Nine in the Morning, and after Four in the Afternoon,) on Pain of forfeiting the ſame.* Par. 3.

Sect. 3. *Alſo no Drover, Horſe-courſer, Waggoner, Butcher or Higler, ſhall travel, or come to their Inn on this Day, on Pain of twenty Shillings. And no Perſon ſhall Uſe, employ, or travel with any Boat or Barge, without the Allowance of ſome Juſtice of Peace*, &c. *on Pain of five Shillings.* But by 11 and 12 Gul. 21. *Forty Watermen may be appointed by the Company*

pany of Watermen to ply on the Thames, *&c.* And by 9 *Ann.* 23. *Hackney Coach-Men are permitted to work within the Bills of Mortality on Sunday.*

Sect. 4. II. All profane Swearing and Curſing; for by 21 *Jac.* 1. 20. and 6 & 7 Gul. 11. *Every Servant, Day-Labourer, Seaman or Soldier, convicted of profane Curſing or Swearing, forfeits one Shilling, and every other Perſon two Shillings, and ſhall be regiſtred at Seſſions*; and by 13 Car. 2. cap. 9. Artic. 2. *All Perſons in the King's Pay at Sea, for profane Oaths,* &c. *ſhall be puniſhed by Fine and Impriſonment, as the Court Martial ſhall think fit.*

2 Stat. 19. Jac. c. 21.

Sect. 5. III. Drunkenneſs, for which by 1 *Jac.* 1. 5. all Perſons whatſoever forfeit five Shillings to the Poor; and for which Seamen may by 13 *Car.* 2. 9. be puniſhed by Fine, *&c.* as the Court Martial ſhall think fit.

Sect. 6. IV. Reviling the Sacrament of the Lord's Supper with contemptuous Words, *&c.* for which (by 1 *Ed.* 6. 1. which was repealed by 1 *Mar.* 2. and revived by 1 *El.* 1.) the Offender ſhall be impriſoned, fined, and ranſomed.

Sect. 7. I ſhall not mention the Offences againſt 2 *&* 3 *Ed.* 6. 19. and 5 *El.* 5. relating to Faſts and Fiſh-days, becauſe it is expreſly declared, That thoſe Statutes are enacted merely on a political Account, and it is made penal to affirm that any eating of Fiſh, or forbearing of Fleſh mentioned therein, is neceſſary to Salvation, or that it is the Service of God.

CHAP. VII.

Of Offences againſt the Common Prayer.

OFFENCES againſt the Eſtabliſhed Church are,

1. Such as concern all Perſons in general;
2. Such as more immediately relate to thoſe of the Popiſh Religion;
3. Such as more immediately regard Proteſtant Diſſenters.

Thoſe which concern all Perſons in general are,

1. Againſt the Common Prayer.
2. In accepting or holding an Office without due Conformity to the Church.
3. In teaching School without conforming to the Church.
4. In not coming to Church.

Sect. 1. And firſt of Offences againſt the Common Prayer, as to which it is to be obſerved, That by 2 *&* 3 *Ed.* 6. 1. and 6 *Ed.* 6. 1. (which were repealed by 1 *Mar.* 2. and revived by 1 *El.* 2.) the Common Prayer Book was firſt eſtabliſhed under ſevere Penalties, but the ſame Penalties being repeated and enlarged by 1 *El.* 2. and 13 *&* 14 *Car.* 2. 4. which enacts the Uſe of the ſame Common Prayer with ſome Alterations; thoſe Statutes of *Ed.* 6. ſeem at this Day to be of little Uſe.

Sect. 2. By 1 *El.* 2. Par. 4, 5 & 6. *If any Parſon, Vicar, or other whatſoever Miniſter, that ought to ſay the ſaid Com. Prayer,* &c. *ſhall refuſe to uſe it in ſuch Church,* &c. *or other Place where he ſhould uſe to miniſter the ſame, or wilfully or*

obſtinately ſtanding in the ſame, uſe any other Form, or ſpeak any Thing in Derogation of the ſaid Book, or any Thing therein contain'd, he forfeits for the firſt Offence one Year's Profit of all his Spiritual Promotions, and ſhall ſuffer ſix Months Impriſonment; and for the ſecond Offence ſhall be deprived, &c. See for the Form of the Indictment, 3 Mod. 78, 79.

In the Conſtruction of this Act it has been reſolved,

Sect. 3. I. That under the Words, *Parſon, Vicar, or other whatſoever Miniſter, that ought or ſhould ſay the ſaid Common Prayer*, &c. thoſe Clergymen who have no Cure are included, as much as thoſe who have one, and that they are puniſhable for uſing any other Form, *&c.* inaſmuch as by their Ordination they are oblig'd to officiate in the Offices of the Church, *&c.* and it is ſaid, that they are ſufficiently ſhewn to be in Holy Orders by the Word *Clericus* in an Indictment. [4] *v. 1 Eliz. c. 2 ſect. 7 and 8.* Dyer 203. pl. 73, 74.

Sect. 4. II. That this Statute being not only in the Affirmative, but alſo expreſly ſaving the Juriſdiction of Eccleſiaſtical Courts, does not reſtrain them from proceeding againſt theſe Offenders in their own Methods, as Diſturbers of the Unity and Peace of the Church; and conſequently that ſuch Perſons may be deprived by the ſaid Court according to the Courſe of the Spiritual Law, for the firſt Offence. 5 Co. Cawdry's Caſe, 5. b. 6. a. Poph. 59. 2 Rol. Abr. 222. 5.

Sect. 5. Alſo it is farther enacted, by 1 *El.* 2. Par. 9. *That if any Perſon ſhall in Plays, Songs, or other open Words, ſpeak any Thing in Derogation, Depraving or Deſpiſing of the ſaid Book*, &c. *Or by open Fact compel, or otherwiſe procure or maintain any Miniſter to ſay any Common Prayer openly*, &c. *in other Form: Or ſhall by any of the ſaid Means let any Miniſter to ſay the ſaid Common Prayer*, &c. *he ſhall forfeit one hundred Marks for the firſt Offence, and four hundred for the ſecond*, &c. (*which if he pay not within ſix Weeks after Conviction, he ſhall ſuffer ſix Months Impriſonment for the firſt Offence, and twelve for the ſecond,*) *and for the third Offence ſhall forfeit all his Goods and Chattels, and ſhall ſuffer Impriſonment for Life.*

Sect. 6. It has been made a Queſtion in the Conſtruction of this Clauſe, Whether if the Party die within ſix Weeks, the ſaid Forfeiture be not diſcharged, ſince by the Act of God the Election of paying it, or ſuffering Impriſonment in lieu of it, is taken away? Dyer 203. 74. 231. 4.

CHAP. VIII.

Of Offences in accepting or holding an Office without due Conformity to the Church.

OFfences in accepting or holding an Office, without due Conformity to the Church, are of two Kinds,

1. In not receiving the Sacrament both before and after the Acceptance of an Office.

2. In going to any other Place for Religious Worſhip, than the Church, during the Continuance in an Office.

Sect. 1. As to the firſt of theſe Offences, it is enacted by 13 *Car.* 2. Stat. 2. *Cap.* 1. Par. 10, 12. *That no Perſon ſhall be placed, elected or choſen, to any Office or Place of Mayor, Alderman, Recorder, Bailiff, Town-Clerk, Common-Council-Man, or other Office of Magiſtracy, Place or Truſt, or other Imploy-*

ment relating to the Government of any City, Corporation, Borough, Cinque-Port, or other Port-Town, who ſhall not have received the Sacrament, ac-
5 Mod. 431. *cording to the Rites of the Church of* England, *within one Year next before ſuch Election; and that every Perſon ſo placed or elected ſhall take the Oaths of Allegiance and Supremacy at the ſame Time when the Oath for the due Execution of the ſaid Office,* &c. *ſhall be adminiſtred; and that the ſaid Oaths ſhall be adminiſtred and tendered by thoſe who adminiſter the Oath of Office, and in Default of ſuch, by two Juſtices of Peace of the Corporation,* &c. (which
[a] 5 Mod. 317, 318. Salk. 428, 429. makes [a] it neceſſary in a Return to a *Mandamus*, ſetting forth that the Party did not take the Oaths before the Mayor, *&c.* to add, that he did not take them before two Juſtices of Peace, *&c.* and it is further enacted, *That on De-*
[b] 5 Mod. 316, 317, 318. 2 Jon. 121. Salk. 428, 429. *fault hereof every ſuch Election, Placing and Choice ſhall be void.* And [b] it hath been adjudged to be no Excuſe, that the Oaths were not tendered.

Sect. 2. Alſo it is enacted by 25 *Car.* 2. *That all Officers Civil and Military, (Except thoſe of Inheritance, appointing ſufficient Deputies) and all, who have any Fee,* &c. *by Patent from the King, (Except ſuch as ſhall be granted for valuable Conſideration for Life or Years, and not relate to any Office or Place of Truſt; and alſo all who have any Place of Truſt, or any Employment in the King's Houſhold, ſhall take the Oaths of Allegiance and Supremacy, and Teſt, the next Term, (in the King's Bench or Chancery, or Quarter-Seſſions;) and receive the Sacrament within three Months, and give in a Certificate thereof, proved by two Witneſſes, to the Court wherein they take the ſaid Oaths. And in Caſe of Neglect ſhall be diſabled to hold the ſaid Offices,* &c. *and forfeit five hundred Pounds, except Femes Covert,* &c. But
[c] Lutw. 910. [c] it hath been adjudged, that the Perſons ſo diſabled loſe only their Right to the Profits of their Offices from the Time of ſuch Diſability; but that they
[d] 2 Mod. 299. [e] 2 Vent. 248. King and Larwood. Sal. 167, 168. 2 Vent. 248. Skin. 574. to 577. Carth. 306, 307. loſe nothing veſted in them before. Alſo [d] it hath been adjudged to be no Excuſe, for a Perſon bound by Law to accept a Corporation Office, that he is diſabled to receive the Sacrament, by having been excommunicated; and [e] *Quære*, if it be any Excuſe, that his Conſcience will not ſuffer him to take it, being a Proteſtant Diſſenter, *&c.*

Sect. 3. Notwithſtanding the Words of the firſt of theſe Acts are ſo very ſtrong as to make ſuch Election, *&c.* void, and thoſe of the ſecond to make ſuch Perſons diſabled in Law to all Intents and Purpoſes whatſo-
[f] Vide 3 Keb. 606, 665, 682, 721. 2 Jon. 81, 137. 2 Lev. 184, 242. 2 Mod. 193, 194. ever, to have, occupy or enjoy the ſaid Offices; [f] yet it hath been ſtrongly holden, that the Acts of one under ſuch a Diſability being inſtated in ſuch an Office, and executing the ſame without any Objection to his Authority, may be valid as to Strangers; for otherwiſe not only thoſe who no Way infringe this Law, but even thoſe whoſe Benefit is intended to be advanced by it, might be Sufferers for another's Fault to which they are no Way privy; and one Chaſm in a Corporation happening thro' the Default of one Head Officer would perpetually vacate the Acts of all others, whoſe Authority, in reſpect of their Admiſſion into their Offices, or otherwiſe, may depend on his.

Sect. 4. By 25 *Car.* 2. Parag. 17. it is expreſly provided, *That the ſaid Act ſhall not extend to Conſtables, or Church-wardens, or ſuch like inferior*
5 Mod. 431, 432. *Civil Officers, or to a Bailiff of a Manor or Lands, or ſuch like private Officers.* But it hath been queſtioned, whether it extends to the Cenſor of the College of Phyſicians?

Sect. 5. As to the ſecond Offence of this Kind, *viz.* that of going to any other Place for Religious Worſhip than the Church, during the Continuance of an Office, it was enacted by 10 *Ann.* 2. *That if any Perſon having any Office, Civil or Military, or receiving any Pay, Salary, Fee or Wages, by reaſon of any Grant from the Crown, or having any Command or Place of*

Truſt from the Crown, or admitted into any Service or Employment in the King's Houſhold or Family, or bearing any Office of Magiſtracy, or Place of Truſt, or other Employment relating to the Government of any City, Corporation, Borough, or Cinque-Port, and obliged by 13 *Car.* 2. Stat. 2. Cap. 1. *or* 25 *Car.* 2. 21. *to receive the Sacrament, according to the Uſage of the Church of* England, *ſhould at any Time after Admiſſion into any ſuch Office,* &c. *and during the Continuance in the ſame, knowingly or willingly be preſent at any Aſſembly in* England, Wales, *or* Berwick *on* Tweed, *for the Exerciſe of Religion in other Manner than according to the Church of* England, *at which Aſſembly there ſhall be ten Perſons beſides thoſe of the Family, or at any ſuch Meeting where ſuch Liturgy is uſed, and the King, and ſuch others as ſhall be lawfully appointed to be prayed for, ſhould not be prayed for in expreſs Words,* &c. *he ſhould forfeit forty Pounds; and be diſabled to hold any Office or Employment whatſoever in* England, &c. But this Statute, ſo far as it relates to this Matter, is repealed by 5 *Geo.* 1. *c.* 4. [5.]

CHAP. IX.

Of Offences in teaching School without conforming to the Church.

Sect. 1. AS to the Offence of teaching School without conforming to the Church, ſo far as it concerns all Perſons in general, it is enacted by 23 *El.* 1. Par. 6 & 7. *That if any Perſon or Perſons, Body Politick or Corporate, ſhall keep or maintain any School-maſter, who ſhall not repair to Church according to the Form of the ſaid Statute, or be allowed by the Biſhop or Ordinary of the Dioceſe, (who ſhall not take any Thing for the ſaid Allowance) they ſhall forfeit for every Month ten Pounds; and ſuch School-maſter preſuming to teach contrary to the ſaid Act, and being thereof convict, ſhall be diſabled to be a Teacher of Youth, and ſhall ſuffer Impriſonment without Bail or Mainpriſe for one Year.*

Sect. 2. And it is farther enacted by 1 *Jac.* 1. 4. Par. 9. *That no Perſon ſhall keep any School, or be a School-maſter, out of the Univerſities or Colleges of this Realm, except it be in ſome publick or free Grammar-School, or in ſome ſuch Nobleman's or Noblewoman's, or Gentleman's or Gentlewoman's Houſe, as are not Recuſants, or where the ſame School-maſter ſhall be ſpecially licenced thereunto by the Archbiſhop, Biſhop, or Guardian of the Spiritualties of that Dioceſe, upon Pain, that as well the School-maſter, as alſo the Party that ſhall retain or maintain any ſuch School-maſter, contrary to the Meaning of the ſaid Statute, ſhall forfeit each of them for every Day, ſo wittingly offending, forty Shillings.* Caith. 464, 465.

Sect. 3. But it having been doubted whether ſuch Perſons as are within the Benefit of 1 *Gul. & Mar.* 18. commonly called *The Toleration Act*, are not exempted from the Penalties of the above mentioned Statutes, it was farther enacted by 12 *Ann.* 7. *That whoever ſhall keep any publick or private School or Seminary, or teach any Youth as Tutor or School-maſter, (unleſs he inſtruct them only in Reading, or Writing, Arithmetick, or ſuch mathematical Learning as relates to navigation, or ſome mechanical Art, and that in the* Engliſh *Tongue; or unleſs he ſhall be a Foreigner of a Foreign reformed Church, and teach the Children of ſuch Foreigners only) without having firſt ſubſcribed that Part of the Declaration in* 13 & 14 Car. 2. *which relates to Conformity to the Liturgy of the Church of* England, *and alſo having obtained a Licence from the Biſhop,* &c. *and ſhall be thereof convicted in any of the Courts at* Weſtminſter,

or

or at the Aſſizes, or before Juſtices of Oyer and Terminer, ſhall be committed to the common Gaol for three Months, &c. But this Statute, ſo far as it relates to this Matter, is repealed by 5 *Geo.* 1. *c.* 4.

As to Popiſh School-maſters in particular, ſee *Chap.* 15. *Sect.* 3.

CHAP. X.

Of Offences in not coming to Church.

FOR the better Underſtanding of the Offences of not coming to Church, ſo far as the ſame relate to all Perſons in general, except ſuch as are within the Indulgence of 1 *Will. & Mar.* 18. which is commonly called *The Toleration Act*, I ſhall conſider:

1. How far Perſons are puniſhable for their own Abſence from the Church.

2. How far they are puniſhable for ſuffering ſuch Abſence in others.

And firſt, In Order to ſhew how far Perſons are puniſhable for their own Abſence, I ſhall conſider the following Particulars:

1. What Forfeitures of Money, Lands or Goods, ſuch Offenders incur.
2. In what Manner they are to be proceeded againſt for thoſe Forfeitures.
3. What other Inconveniencies they are ſubject unto.
4. By what Means they may be diſcharged.

As to the firſt Point, I ſhall conſider,

1. What Forfeitures of Money; and,

2. What Forfeitures of Lands and Goods ſuch Offenders are liable unto.

And firſt, The Forfeitures of Money, to which they are liable, are threefold;

1. That of twelve Pence for the Abſence of one Sunday, or other Holy Day.
2. That of twenty Pounds for the Abſence of every Month contained in a Conviction.
3. That of twenty Pounds for the Abſence of every Month after a Conviction.

Sect. 1. And firſt, the Forfeiture of twelve Pence for the Abſence of one *Sunday*, or other Holy Day, depends upon 1 *El.* 2. by which it is enacted, *That all Perſons inhabiting within this Realm, or any other the King's Dominions, ſhall diligently and faithfully, having no lawful or reaſonable Excuſe to be abſent, endeavour to reſort to their Pariſh Church or Cha-*

pel accuſtomed, or upon reaſonable Let thereof, to ſome uſual Place, where Common Prayer and ſuch Service of God ſhall be uſed, in ſuch Time of Let, upon every Sunday, and other Days ordained and uſed to be kept as Holy Days, and then and there to abide orderly and ſoberly, during the Time of the Common Prayer, Preaching, or other Service of God there to be uſed and miniſtered, upon Pain of Puniſhment by the Cenſures of the Church, and alſo upon Pain that every Perſon ſo offending ſhall forfeit for every ſuch Offence twelve Pence.

In the Expoſition of this Statute, the following Opinions have been holden.

Sect. 2. I. That the Indictment needs not ſhew that the Party had no reaſonable Excuſe for his Abſence, or that he is an Inhabitant within this Realm, *&c.* But that the Defendant, if he have any Matter of this Kind in his Favour, ought to ſhew it.

2 Leon. 5. Godbolt 148. See 29 El. 6. Par. 5.

Sect. 3. II. That if the Spiritual Court, proceeding upon this Statute, refuſe to allow a reaſonable Excuſe, they may be prohibited; but that if they proceed wholly on their own Canons, they ſhall not be at all comptrolled by the Common Law, (unleſs they act in Derogation from it, as by queſtioning a Matter not triable by them, as the Bounds of a Pariſh, *&c.* for they ſhall be preſumed to be the beſt Judges of their own Laws.

2 Rol. Rep. 438, 455.

1 Bulſt. 159. See Gibſ. 358.

Sect. 4. III. That he who miſbehaves himſelf in the Church, or miſſes either Morning or Evening Prayer, or goes away before the whole Service is over, is as much within the Statute as he who is wholly abſent; and that he who is abſent from his own Pariſh Church, ſhall be put to prove where he went to Church.

1 Rol. Rep. 93. Godbolt 148. Dal. ca. 45. fol. 106. 1 Syd. 230.

Sect. 5. IV. That the Offence in not coming to Church conſiſting wholly in a Non-feaſance, and not ſuppoſing any Fact done, but barely the Omiſſion of what ought to be done, needs not be alledged in any certain Place; for properly ſpeaking, it is not committed any where.

1 And. 139. Hob. 251. See 2 Leon. 167.

Sect. 6. Secondly, The Forfeiture of twenty Pounds for the Abſence of a whole Month contained in a Conviction, depends upon 23 *El.* 1. Par. 5. by which it is enacted, *That every Perſon above the Age of ſixteen Years, who ſhall not repair to ſome Church, Chapel or uſual Place of Common Prayer, but forbear the ſame, contrary to the Tenor of the ſaid Statute of* 1 El. 2. *and being thereof lawfully convicted, ſhall forfeit to the King, for every Month which he or ſhe ſhall ſo forbear, twenty Pounds.*

Precedent of Declaration, Lutw. 201, 208.

In the Expoſition hereof it hath been reſolved,

Sect. 7. I. That this Statute, by inflicting twenty Pounds for a Month's Abſence, diſpenſes not with the Forfeiture of twelve Pence, given by 1 *El.* 2. for the Abſence of one *Sunday*, for both may well ſtand together, and the twelve Pence is immediately forfeited upon the Abſence of each particular Day.

11 Co. 63. b. 1 Rol. Rep. 94.

Sect. 8. II. That theſe Words, *being thereof lawfully convicted*, are no more than the Law would have implied, if they had not been expreſſed, and therefore operate nothing; from whence it follows, That they neither cauſe the Party to forfeit any Thing by a Conviction, unleſs Judgment be given thereon, nor reſtrain the Forfeiture to ſuch Offences only, as are committed after a previous Conviction, inaſmuch as they mean no more than what the Law provides of common Right in every Caſe, *viz.* That the Party ſhall forfeit nothing till he be convicted.

Lutw. 162, 163. 11 Co. 57. b. 59. b. 1 Rol. Rep. 89, 90, 233, 234. Dy. 160. pl. 40. 3 Bulſt. 87.

11 Co. 58.a.b. 60. a. 1 Rol. Rep. 89, 90.

Sect. 9. III. That he who is condemned on Demurrer, or *Nihil dicit*, is ſufficiently convicted within the Act; for whoever is adjudged, is convict, though it follow not that every one, who is convict, is adjudged, *&c.*

Cro. Jac. 529.

Sect. 10. IV. That one, who was ſick for Part of the Time contained in an Information upon this Statute, ſhall not be at all excuſed by Reaſon of ſuch Sickneſs, if it be proved that he was a Recuſant both before and after; for it ſhall be intended that he obſtinately forbore during that Time.

Yel. 100. Cro. El. 835. 2 Rol. Abr. 521. c. Cawley 61.

Sect. 11. V. That the Time of a Month, intended by the Statute, ſhall be computed not by the Kalendar, but by the Number of Days, allowing 28 Days to each, according to the common Rule of expounding Statutes, which ſpeak generally of a Month.

[a] 3 Lev. 333. Lut. 203, 1117. 2 Mod. 240, 241. 1 And. 294, 295.

Sect. 12. Thirdly, The Forfeiture of twenty Pounds for the Abſence of every Month after a Conviction, depends upon 28 (commonly called [a] 29) *El.* 6. Par. 2, 3, 4. and 3 *Jac.* 1. 4. Par. 8, 3. by which it is enacted, *That every Offender being convicted of not coming to Church, contrary to the Purport of the Statutes above mentioned, ſhall pay twenty Pounds for every Month after ſuch Conviction, until he ſhall conform himſelf, and come to Church.*

Sect. 13. As to the ſecond Branch of this Head, *viz.* What Forfeiture of Lands and Goods ſuch Offenders are liable to, the ſame depends alſo upon 29 *El.* 6. Par. 4. and 3 *Jac.* 1. 4. Par. 8, 9. by which it is enacted, *That if the Offender ſhall make Default of Payment of the twenty Pounds, both for every Month contained in the Conviction, and alſo for every Month ſubſequent, during which he ſhall not conform himſelf to the Church, the King ſhall take, ſeize and enjoy all his Goods, and two Parts of his Hereditaments, Leaſes and Farms, leaving the third Part only of the ſame Hereditaments, Leaſes and Farms, to and for the Maintenance and Relief of the ſame Offender, his Wife, Children and Family, notwithſtanding any prior Conveyance thereof made by ſuch Offender, with Power of Revocation, or to the Uſe of himſelf or his Family. Alſo by the ſaid Statute of* 3 Jac. 1. 4. Par. 11. *the King may refuſe the Penalty of twenty Pounds a Month, tho' it be tendered according to Law, and thereupon ſeiſe two Parts of all the Hereditaments, Leaſes and Farms, which at the Time of ſuch Seizure ſhall be, or afterwards ſhall come to any ſuch Offender, or to any other to his Uſe, or in Truſt for him, or at his Diſpoſition, or whereby or in Conſideration whereof he or his Family ſhall be relieved, maintained or kept, leaving unto him his chief Manſion-Houſe, as Part of his third Part.*

See 29 El. 6. Par. 1, 8.

In the Conſtruction of theſe Statutes the following Points have been reſolved.

1 Jones 24, 25. Cawley 171, 172.

Sect. 14. I. That the King by making his Election given him by 3 *Jac.* 1. to ſeize the Offender's Hereditaments, *&c.* waves the Benefit of the twenty Pounds a Month, and the Power of ſeizing the Offender's Goods.

12 Co. 1, 2. 1 Leon. 98. 1 Rol. Rep. 7.

Sect. 15. II. That a Recognizance or Bond taken by ſuch Offenders, either in their own Names or in the Names of others to their Uſe, are within the Statute 29 *El.* for the Words thereof to this Purpoſe are, *That the King ſhall take, ſeize, and enjoy all the Goods, &c.* which in an Act of Parliament will include the whole perſonal Eſtate; and though a Choſe in Action cannot properly be ſaid to be taken or ſeiſed, yet may it properly enough be ſaid to be enjoyed.

Owen 37. 1 Leon. 97. Cawley 107.a.

Sect. 16. III. That no Copyhold Lands are within 29 *El.* (and by the ſame Reaſon it ſeemeth that they are not within 3 *Jac.* 1.) in Reſpect of the Prejudice, which would accrue to the Lord by the Loſs of his Services, *&c.*

Sect. 17. IV. That the Profits of the Lands ſeized by the King by Force of 29 *El.* for the Non-payment of the twenty Pounds a Month, ought not to be applied to the Satisfaction thereof, but that the Lands ought to remain in the King's Hands by Way of Pledge, till the whole Forfeiture be paid ſome other Way; but this Conſtruction of the Statute ſeeming over ſevere, it was provided by 3 *Jac.* 1. 4. Par. 5. *That the Profits of the ſaid Lands ſhould go towards the Satisfaction of the twenty Pounds.* Cro. El. 845. 2Rol.Rep.25. Palm. 41. Sir W. Jones 24.

Sect. 18. It hath been queſtioned, Whether an Eſtate conveyed by another in Truſt for a Recuſant, be liable to be ſeized by Force of the ſaid Statute of 29 *El.* becauſe it expreſly avoids ſuch Conveyances only as are made by the Recuſant himſelf *to his own Uſe*, &c. And perhaps if it ſhall plainly appear, That an Eſtate is ſettled *bona fide* in Truſt for a Recuſant, by ſome Friend of his, upon ſome other View, and not meerly with an Intent to evade the Statute, it may be reaſonable to exempt ſuch a Conveyance out of the Meaning of it; however it is clear from the expreſs Words of 3 *Jac.* 1. 4. Par. 11. *That the King, upon his waving the Forfeiture of the twenty Pounds a Month, may ſeize two Parts of all the Hereditaments,* &c. *which ſhall come to any ſuch Offenders, or to others to their Uſe, or in Truſt for them:* Alſo it is ſaid, That the King may ſeize an Eſtate, which is granted to a Recuſant in Truſt for another; and it is certain that the Statute has made no expreſs Proviſion for the *Ceſtui que Truſt.* Lane 105, 106. Cawley 169. See 12 Co. 1, 2. Lane 39.

As to the ſecond general Head of this Chapter, *viz.* In what Manner Offenders of this Nature are to be proceeded againſt for the Forfeitures above mentioned, I ſhall conſider,

1. How they are to be proceeded againſt for the ſaid Forfeitures of Money, and

2. In what Manner for the ſaid Forfeitures of Lands and Goods.

As to the Proſecution for the ſaid Forfeitures of Money, I ſhall ſhew,

1. How they are to be proceeded againſt for the ſaid Forfeiture of twelve Pence for the Abſence of every *Sunday*, &c. and

2. In what Manner for the ſaid Forfeiture of twenty Pounds for the Abſence of every Month contained in a Conviction, and

3. In what Manner for the ſaid Forfeiture of twenty Pounds for the Abſence of every Month after a Conviction.

Sect. 19. And firſt, As to the Recovery of the ſaid Forfeiture of twelve Pence for the Abſence of every *Sunday*, it was enacted by 1 *El.* 2. *That the ſame ſhould be levied by the Church-wardens of the Pariſh where ſuch Offence ſhould be done, to the Uſe of the Poor of the ſame Pariſh, of the Goods, Lands, and Tenements of ſuch Offenders, by Way of Diſtreſs:* But this being defective in not ſhewing by whom, or in what Manner ſuch Offenders ſhould be convicted, or by whom the Warrant for levying the ſaid Forfeiture ſhould be granted; it was farther enacted by 3 *Jac.* 1. 4. Par. 27. *That it ſhall be lawful for any one Juſtice of the Peace of the Limit, Diviſion, or Liberty, wherein the ſaid Party ſhall dwell, upon the Confeſſion of the Party, or the Oath of one Witneſs, to call the ſaid Party before him, and if he ſhall not make a ſufficient Excuſe, and due Proof thereof, to the Satisfaction of the ſaid Juſtice of Peace, that it ſhall be lawful for the ſaid Juſtice of Peace to make a Warrant to the Church-warden of the ſaid Pariſh, where the ſaid Party ſhall dwell, to levy 12 Pence for every ſuch Default, by Diſtreſs and Sale of the Offender's Goods, rendering the Overplus to the ſaid Offender; and that in Default of ſuch Diſtreſs, it ſhall be lawful for the ſaid Juſtice of Peace to commit every ſuch Offender to Priſon, until the ſaid Forfeiture ſhall be paid, which ſhall be employed to*

the

the Uſe of the Poor of the Pariſh, wherein the Offender ſhall be reſident or abiding at the Time of the Offence.

Sect. 20. As to the ſecond Point, *viz.* In what Manner the ſaid Offenders are to be proceeded againſt for the ſaid Forfeiture of twenty Pounds for the Abſence of every Month contained in a Conviction, I ſhall conſider,

1. In what Manner the ſame may be recovered at the Suit of the King, and

2. In what Manner at the Suit of an Informer.

And firſt, as to the Recovery hereof at the King's Suit, I ſhall conſider,

1. In what Manner it may be recovered at the King's Suit by Way of Indictment.

2. In what Manner by Way of Action or Information.

See 1 Rol. Rep. 94. 11 Co. 63. Cawley 66, 67, 82, 83.

Sect. 21. And firſt, as to the Recovery hereof at the Suit of the King by Way of Indictment, it was enacted by 23 *El.* 1. Par. 9. *That the Juſtices of Oyer, Aſſize, Gaol-Delivery, and Quarter-Seſſions of the Peace, might enquire of and determine theſe Offences, within one Year and a Day:* But by 29 *El.* 6. Par. 2. *It was ordained that all ſuch Convictions ſhould be in the King's Bench, or at the Aſſizes, or General Gaol-Delivery, and not elſewhere:* However by 3 *Jac.* 1. 4. Par. 7. the Juriſdiction of the Seſſions is revived.

Precedent Lut. 203, 1101.

Sect. 22. Alſo it is farther enacted by 29 *El.* 6. Par. 5. and 3 *Jac.* 1. 4. Par. 7. *That upon an Indictment at the Aſſizes, Gaol-Delivery, or General Seſſions of the Peace, Proclamation ſhall be made that the Offender render himſelf to the Sheriff before the next Aſſizes, Gaol-Delivery or Seſſions; and that if he ſhall not then appear of Record, upon ſuch Default recorded, the ſame ſhall be a Conviction in Law, as if a Trial by Verdict on the Indictment had been recorded.* And by Par. 9. *Every ſuch Conviction ſhall be certified into the Exchequer*, &c.

Sal. 145.

Sect. 23. In the Conſtruction hereof it hath been reſolved, I. That ſuch a Conviction ſhall not be look'd on as a Judgment; for the Words are, *It ſhall be a Conviction in Law, as if a Trial*, &c. *had been recorded:* And conſequently that it cannot be reverſed by Writ of Error, which cannot be brought on any Record, which is not a Judgment, and therefore that the Party has no other Remedy againſt an inſufficient Conviction, but to remove it into the Exchequer, and quaſh it there. Alſo upon the ſame Ground it has been holden, That a Forfeiture due to the King, by Force of ſuch a Conviction, ſhall not be taken to be within the Exception of a general Pardon, which excepts all Forfeitures, *&c.* converted to a Debt by Judgment.

1 Vent. 355. Raym. 434.

Vide Sal. 145. pl. 5. 11 Co. 65. a. Vide infra Sect. 42.

Palm. 40, 41. Bridg. 123. 3 Lev. 333. Lut. 1117.

Sect. 24. II. That if the Proclamation do not purſue the Statute, as if it appoint that the Body ſhall be rendered at next Seſſions, *&c.* whereas by the Statute it ought to order a Render to the Sheriff, and that before the next Seſſions, the Conviction is inſufficient.

Cawley 164. Poph. 29. Keilw. 180. a.

Sect. 25. III. That an actual perſonal Appearance of the Defendant at the next Seſſions, *&c.* will no Way avail him, unleſs the ſame be entered of Record.

Hob. 205.

Sect. 26. It hath been holden, That a Man cannot be convicted by Force of this Statute upon a Default on a Proclamation, *&c.* in the King's Bench, becauſe this Court is not mentioned in the Statute: But perhaps this Opinion may juſtly be queſtioned, becauſe the Court of King's Bench being the ſupreme Court of Aſſiſe, and Gaol-Delivery, *&c.* in the County where it ſits, it ſeems that a Statute by giving any Power to the Courts of Aſſize, or Gaol-Delivery, does impliedly give the ſame to the Court of King's Bench, unleſs it have ſome reſtrictive Words to the contrary.

H. P. C. 156. Cro. Ca. 465. 2 Lev. 179. 2 Mod. 128, 129.

Sect. 27. If the Defendant do appear, there is no Doubt but that the Proceedings ought to be according to the common Courſe of Law upon other Indictments in all Reſpects, except thoſe which are within the Reſtraint of 3 *Jac.* 1. 4. Par. 16, 17. by which it is enacted, *That no ſuch Indictment, nor any Proclamation, Outlawry or other Proceeding thereupon, ſhall at any Time hereafter be avoided, diſcharged or reverſed, by reaſon of any Default in Form or lack of Form, or other Defect whatſoever, (other than by direct Traverſe to the Point of not coming to Church, &c.) but the ſame Indictment ſhall ſtand in Force and be proceeded upon; any ſuch Default of Form, or other Defect whatſoever notwithſtanding, unleſs the Party ſo indicted ſhall conform,* &c. Cro. Ca. 504. Raym. 434.

Sect. 28. However it hath been reſolved,

I. That the Party is only reſtrained from taking Advantage of Defects in the Record it ſelf, and that he may plead any collateral Matter, as a Pardon, or *Autrefoits convict*, &c. 11 Co. 59. b. 65. a. b. 1 Rol. Rep. 95. Cro. Jac. 480, 482.

Sect. 29. II. That he may even reverſe a Judgment after Verdict for any ſuch Defect in the Record it ſelf, as tends to the King's Prejudice, as the Omiſſion of a *Capiatur*, *&c.* And that he may reverſe an Outlawry for any common Defect, upon putting in Bail, and traverſing the Indictment as to the Point of not coming to Church; which is very agreeable to the Purport of the whole Clauſe, the latter Part whereof ſeems manifeſtly to qualify the Generality of the former. Cro. Ca. 504, 505. Show. 309. 5 Mod. 141. 3 Keb. 591.

Sect. 30. Secondly, As to the Recovery of the ſaid Forfeiture by way of Action or Information at the King's Suit, it was enacted by 35 *El.* 1. Par. 10. *That all and every the ſaid Pains, Duties, Forfeitures and Payments, ſhall and may be recovered and levied to her Majeſty's Uſe, by Action of Debt, Bill, Plaint, Information or otherwiſe, in any of the Courts commonly called the King's Bench, Common Pleas, or Exchequer, in ſuch Sort and in all Reſpects, as by the ordinary Courſe of the Common Laws of this Realm, any other Debt due by any ſuch Perſon in any other Caſe ſhould or may be recovered or levied, wherein no Eſſoin, Protection or Wager of Law ſhall be admitted or allowed.*

Sect. 31. It is ſaid, That the principal End of making this Clauſe, was to enable the Queen to proceed againſt the Husband for the Recuſancy of his Wife, which ſhe could not do by Virtue of any of the former Statutes, by which ſhe had no other Way of proceeding but by Indictment, and conſequently could not charge the Husband for the Forfeiture of the Wife, becauſe ſhe could not make him a Party to the Suit, as ſhe may by Force of this Statute; However it is ſaid, That on a Conviction of the Wife upon an Indictment, the Lands and Leaſes, which the Huſband has in her Right, may be ſeiſed by the Exchequer-Proceſs. 11 Co. 61. b. 62. a. Vide ſupra ca. 1. Sect. 13. Cro. Jac. 482. Bridgm. 122. ſeems cont.

Sect. 32. As to the ſecond Particular, *viz.* In what Manner an Informer may proceed for the Forfeitures aforeſaid, it is enacted by 23 *El.* 1. Par. 11. *That all Forfeitures of any Sums of Money limited by that Act, ſhall be divided into three equal Parts, whereof one Third ſhall be to the Queen, to her own Uſe; one other Third to the Queen; for the Relief of the Poor in the Pariſh where the Offence ſhall be committed, to be delivered by the Warrant of the principal Officers in the Receipt of the Exchequer, without further Warrant from her Majeſty; and the other Third to ſuch Perſon, as will ſue for the ſame in any Court of Record, by Action of Debt, Bill, Plaint, or Information, in which Suit no Eſſoin,* &c. *ſhall be allowed: And that every Perſon which ſhall forfeit any Sums of Money by Virtue of that Act, and ſhall not be able, or ſhall fail to pay the ſame within three Months after Judgment thereof given, ſhall be* 2 Leon. 167. & 29 Eliz. 6. Par. 7.

committed to priſon, there to remain until he have paid the ſame Sums, or conform himſelf to go to Church, and there do as is aforeſaid.

Sect. 33. It has been objected, that this Clauſe ſhall not extend to the ſaid Forfeiture of twenty Pounds a Month for not coming to Church, becauſe the ſame is by the former Part of this Statute given expreſly to the Queen, whereas the Forfeitures for ſaying or hearing Maſs, and keeping an unlicenced School-maſter, are inflicted by the ſame Statute indefinitely, and not expreſly given to any one; from which it is argued, That this latter Clauſe of Diſtribution ought only to be applied to the ſaid indefinite Clauſes, and not to take from the Queen any Part of that, which was expreſly given her before; yet it has been anſwered and reſolved, That it ſhall equally extend to all; for the Limitation of the Forfeiture to the Queen is mere Surplus, and no more than the Law would have implied, & *expreſſio eorum, quæ tacite inſunt, nihil operatur.*

11 Co. 58. a. See 3 & 6 Par. 1 Rol. Rep. 89.

11 Co. 58. a.

Sect. 34. Alſo it has been reſolved, That an Informer may ſue, not only for the third Part which belongs to him, but for the whole Penalty in the Behalf of himſelf and the King, and that the Judgment ſhall be that they ſhall recover, *&c.*

1 And. 139, 140. B. 2. Ch. 26. Sect. 76.

Sect. 35. Alſo it has been adjudged, that neither the above mentioned Clauſe of 29 *El.* 6. which orders, That all Convictions upon 23 *El.* ſhall be certified into the Exchequer, and alſo that the Offender ſhall pay to the Queen twenty Pounds for every Month contained in the Indictment, *&c.* nor the ſaid Clauſe in the 35 *El.* 1. by which it is enacted, That all the ſaid Pains, *&c.* ſhall be recovered to the Queen's Uſe, do take away the Suit of the Informer, againſt one not proceeded againſt by the King, or the third Part of the Penalty given him by 23 *Eliz.* For the plain Purport of both theſe Acts is to further the Puniſhment of Recuſants, and therefore inaſmuch as they are in the Affirmative, and conſiſtent with 23 *El.* they ſhall not be conſtrued to abrogate any Part of it.

Supra Sect. 13.

Supra Sect. 33.

11 Co. 61, 62. 1 Rol. Rep. 92, 93.

Sect. 36. Moreover it is manifeſt, that 29 *El.* 6. extends only to the King's Suit by Indictment, for the Word Indictment is mentioned almoſt in every Clauſe.

Sect. 37. And it alſo follows from hence, That the ſecond Paragraph of the ſaid Statute of 29 *El.* which enacts, That Convictions for this Offence ſhall be only at Aſſizes, Gaol-Delivery, or the King's Bench, reſtrains only Convictions upon Indictments, and conſequently does not any Way impeach the Juriſdiction of the Common Pleas or Exchequer, as to Informations, *&c.*

Hob. 205. Con. 11 Co. 61. a.

Sect. 38. It ſeems the better Opinion (upon comparing all the Books together, which differ much from one another both in ſtating the Caſes, and giving the Reaſons of the Judgments relating to this Matter,) that a Conviction at the King's Suit, whether ſtrictly regular or erroneous, may be pleaded to a Suit by an Informer, becauſe while it ſtands in Force, it makes the Party liable to the Forfeiture of twenty Pounds a Month, and no one ought to be puniſhed twice for the ſame Offence: But it hath been reſolved, that an erroneous, and ſtrongly holden that a regular, Conviction by Proclamation cannot be pleaded to a new Suit by the King, becauſe ſuch a Conviction is of no greater Effect than a Conviction by Verdict, and conſequently the King may wave it and begin anew.

11 Co. 59. b. 65. a. See B. 2. Ch. 26. Sect. 63. Lutw. 208. 1 Rol. Rep. 93. Cro. Jac. 481, 482. Noy 117. Lane 60. Palm. 39, 40, 41. 2 Rol. Re. 108. Bridg. 122, 123.

Sect. 39. But it ſeems very doubtful, whether the Conviction of a Feme Covert upon an Indictment can be pleaded to an Information againſt her and her Husband, becauſe the Husband is not liable to pay the Forfeiture recovered upon an Indictment.

Cro. Jac. 481, 482. Bridg. 120, 121, 122. 2 Rol. Re. 108. Vide ſupra, cap. 1. Sect. 13.

Sect. 40. It ſeems that the ordinary Method of recovering the ſaid Forfeiture of twenty Pounds for every Month contained in a Conviction, either at the Suit of the King, or of an Informer, may ſufficiently appear from what has been already ſaid; but there is an extraordinary Remedy provided by the ſaid Statute of 29 *El.* 6. to enforce the Party to take Care of the Payment of the Forfeiture of the twenty Pounds for every Month contained in an Indictment, whereon he ſhall be convicted, by making his Lands and Goods liable to be ſeized by the King for the Non-payment thereof into the Exchequer, upon ſuch of the Terms of *Eaſter* or *Michaelmas*, as ſhall be next after his Conviction; but this extends not to a Conviction by Way of Action, or Information, as more fully appears from the two next Sections.

Sect. 41. As to the third Point, *viz.* In what Manner the Forfeiture of twenty Pounds for the Abſence of every Month after a Conviction is to be recovered, it ſeems needleſs to enquire how far it may be recovered by an Action or Information for it at the King's Suit, inaſmuch as the ſaid Statutes of 29 *El.* 6. & 3 *Jac.* 1. have made a moſt effectual Proviſion for the Payment of it, by expreſly enacting, *That every ſuch Offender being once convicted, ſhall for every Month after ſuch Conviction, without any other Indictment or Conviction, pay into the Exchequer twice in the Year*, viz. *in every* Eaſter *and* Michaelmas *Term, as much as ſhall then remain unpaid, after the Rate of twenty Pounds for every Month after a Conviction, and that for a Default herein the King may ſeize all the Goods, and two Parts of the Hereditaments of ſuch an Offender*, &c.

Sect. 42. But it ſeemeth that theſe Clauſes extend not to any Conviction upon an Information, or Action, &c. but only to a Conviction upon an Indictment, for there is no other Suit referred to beſides that of Indictment; alſo it is ſaid, that the ſaid Clauſes extend to no Convictions by Verdict or otherwiſe, unleſs Judgment be given thereon; becauſe, till then nothing is forfeited. And from the ſame Ground it ſeems to follow, That they would not have extended to a Conviction by Default upon Proclamation, if there had been no other Words in the Statute to this Purpoſe, than thoſe by which it is enacted, *That ſuch a Default recorded ſhall be as ſufficient a Conviction in Law of the ſaid Offence, whereof the Party ſtandeth indicted, as if upon the ſame Indictment a Trial by Verdict thereupon had proceeded and been recorded*, which Words of themſelves can by no Means make ſuch a Conviction amount to a Judgment after Verdict, without which their can be no Forfeiture upon any other Conviction; and therefore it ſeemeth that the Forfeiture cauſed by ſuch a Conviction muſt depend upon the other Clauſes of the ſaid Statutes, and the conſtant Tenor of our Law Books, which ſeem to ſuppoſe that a Perſon ſo convicted ſhall be liable to the ſaid Forfeitures, as much as one, againſt whom a Judgment is expreſly given.

Cawley 102, 103. Vide ſupra, Sect. 8. Vide infra, Sect. 56. See 29 El. 6. Par. 6. 3 Jac. 1. 4. Par. 7, 8, 9. Cawley 103, 104.

Sect. 43. As to the ſecond general Branch of this Head, *viz.* In what Manner Offenders of this Nature are to be proſecuted for the Forfeiture of Lands or Goods, it appeareth from the 13th, 14th, 15th, 17th, 18th, 40th and 41ſt Sections of this Chapter, that the King hath his Election either to ſeize all the Goods and two Parts of the Hereditaments and Leaſes of the Offender, upon his making Default in the Payment of twenty Pounds, both for every Month contained in an Indictment, whereon he ſhall be convicted, and alſo for every Month ſubſequent, or elſe to refuſe the ſaid Penalty of twenty Pounds a Month, and thereupon to ſeize two Parts of the Hereditaments and Leaſes of the Offender.

Sect. 44. It alſo appeareth from what hath been ſaid in the forty ſecond Section of this Chapter, that the King hath this Advantage of ſeizing the Lands and Goods of the Offender upon no other Conviction, but ſuch as followeth an Indictment, nor even upon ſuch a Conviction without a Judgment, unleſs it be cauſed by a Default upon a Proclamation; therefore I ſhall add no more to this Head, except theſe two following Obſervations:

2 Inſt. 573. 8 Co. 169. Plowd. 486.

Sect. 45. I. That the King cannot ſeize the Lands, till it appears by the Return of an Inquiſition to that Purpoſe to be awarded, of what Lands, *&c.* the Offender was ſeized, becauſe the King's Title to Lands ought always to appear of Record.

Bro. Coro. 2, 14, 25, 45, 47, 55, 60. 1 Rol. Rep. 7. 2 Rol. Ab. 184. pl. 3.

Sect. 46. II. That the King, according to the better Opinion, may ſeize the Goods, but not grant them over, without ſuch an Inquiſition.

Sect. 47. As to the third general Head of this Chapter, *viz.* What Diſabilities, and other Inconveniencies, Offenders of this Kind are liable unto, it is enacted by 3 *Jac.* 1. 5. Par. 8. *That no Recuſant convict ſhall practice either the Common or Civil Law, or Phyſick, or uſe the Trade of an Apothecary, or be Judge or Miniſter of any Court, or bear any Office in Camp, Troop, or Company of Soldiers, or in any Ship, or Fortreſs, but ſhall be utterly diſabled for the ſame, and forfeit for every ſuch Offence, one hundred Pounds.*

Sect. 48. Alſo it is farther enacted by the ſaid Statute of 3 *Jac.* 1. 5. Par. 22. *That ſuch Recuſants, as ſhall be convicted at the Time of the Death of any Teſtator, or at the Time of the Granting of any Adminiſtration, ſhall be diſabled to be Executors or Adminiſtrators; and that no ſuch Perſons ſhall be Guardians to any Child,* &c.

Sect. 49. And it is enacted by 23 *El.* 1. *That every Perſon forbearing the Church twelve Months, ſhall on Certificate thereof into the King's Bench by the Ordinary, a Juſtice of Aſſize and Gaol-Delivery, or a Juſtice of Peace of the County where ſuch Offender ſhall dwell or be, be bound with two ſufficient Sureties in the Sum of two hundred Pounds at the leaſt to the Good Behaviour, and ſo continue bound until ſuch Offender ſhall conform himſelf,* &c.

Sect. 50. As to the fourth general Head of this Chapter, *viz.* By what Means Offenders of this Nature may be diſcharged from the ſaid Forfeitures, *&c.* it is enacted by 23 *El.* 1. Par. 10. *That every Perſon guilty of the above-mentioned Offences, who ſhall before he be thereof indicted, or at his Arraignment or Trial before Judgment, ſubmit and conform himſelf before the Biſhop of the Dioceſe where he ſhall be reſident, or before the Juſtices where he ſhall be indicted, arraigned, or tried, (having not before made like Submiſſion at any his Trial, being indicted for his firſt like Offence,) ſhall upon his Recognition of ſuch Submiſſion in open Aſſizes, or Seſſions of the County where ſuch Perſon ſhall be reſident, be diſcharged of all and every the ſaid Offences againſt the ſaid Statute,* &c.

Sect. 51. Alſo it is enacted by 29 *El.* 6. Par. 6. *That whenſoever any ſuch Offender ſhall make Submiſſion, and become conformable, according to the Form limited by the above mentioned Statute of* 23 El. 1. *or ſhall fortune to die, that then no Forfeiture of twenty Pounds for any Month, or Seizure of the Lands of the ſame Offender, from and after ſuch Submiſſion and Conformity, or Death, and full Satisfaction of all the Arrearages of twenty Pounds Monthly, before ſuch Seizure due or payable, ſhall enſue, or be continued againſt ſuch Offender, ſo long as the ſame Perſon ſhall continue in coming to Divine Service, according to the Intent of the ſaid Statute.*

Sect. 52. But this Statute being thought not to give ſufficient Encouragement to ſuch Perſons to conform to the Church, becauſe, by the moſt favourable Conſtruction that could be made, it ſtill obliged them

to pay ſuch Debts as were due to the King by Force of a Judgment, it was enacted by 1 *Jac.* 1. 4. Par. 2. *That a Recuſant conforming himſelf according to the Meaning of the above mentioned Statutes, &c. ſhall, during ſuch Conformity, be diſcharged of all Penalties, which he might otherwiſe ſuſtain by Reaſon of his Recuſancy.* 1 Rol. Rep. 94.

Sect. 53. And it hath been reſolved, that ſuch Conformity may by Force of this Statute be pleaded as well to the Suit of an Informer as to that of the King; and that after Judgment it will be a good Ground for an *Audita Querela* againſt an Informer; and alſo may be pleaded againſt the King before Execution awarded. Raym. 391, 465. 2 Jon. 187. 1 Mod. 213. 1 Rol. Rep. 95. 2 Bulſt. 324, 325.

Sect. 54. However, there ſeems to be no Remedy for ſuch a Perſon to get a Reſtitution of ſuch of the Profits of his Lands, as have been actually taken by the King. Savil 130.

Sect. 55. It ſeemed very doubtful before 1 *Jac.* 1. 4. how far the Lands of an Heir were chargeable with the Forfeitures incurred by his Anceſtor in Reſpect of his Recuſancy; but this ſeems to be for the moſt part cleared by the 3d, 4th and 5th Paragraphs of that Statute, by which it is enacted, *That the Heir, if he be no Recuſant, or were ſuch, and conform, ſhall be freed from all Penalties happening upon him by reaſon of his Anceſtor's Recuſancy, unleſs the two Parts of the Lands were ſeiſed by the King in the Anceſtor's Life, in which Caſe they ſhall continue in the King's Hands till the whole Debt ſhall be levied. But it is farther enacted, that the King ſhall not extend the other third Part of the Lands for the ſaid Penalty.* Lane 92, 93, 106. Cawley 109, 110.

Sect. 56. It ſeems by the manifeſt Purport of this Statute, that the Heir of a Recuſant, being alſo a Recuſant himſelf, has no Remedy, but by conforming, to free his Fee-Simple Lands from any of the Forfeitures incurred by the Conviction of his Anceſtor, whether the Lands were ſeized in the Anceſtor's Life or not: However, it is ſaid, that the Land in Fee-Tail, which he claims from ſuch Anceſtor, is no Way chargeable after the Death of the Anceſtor, with any Forfeitures upon a Conviction by Proclamation, (which has no greater Effect than a Verdict recorded) but only with ſuch, as are due upon a Judgment; which, as it is agreed, charge an Heir in Tail by Force of 33 *H.* 8. 39. Par. 29. which makes an Heir chargeable with the Debts of his Anceſtor by Judgment, Recognizance, Obligation, or other Specialty; but perhaps the Authority of theſe Opinions may juſtly be queſtioned: For tho' a Conviction by Proclamation amount not to a Judgment, yet ſurely it cannot be inferior to an Obligation: And therefore perhaps the Books cited in the Margin are miſreported in this Particular, and the more proper Diſtinction may be this: That an Heir in Tail is chargeable only with the Forfeitures for thoſe Months, which are contained in the Indictment it ſelf, on which a Judgment is afterwards given, or a Conviction by Proclamation recorded, and not for the Months ſubſequent to ſuch Conviction, or Proclamation, inaſmuch as the firſt ſeem to be Debts appearing of Record, the latter not; and the ſame Diſtinction ſeems applicable to ſuch Lands in Tail of an Heir who conforms, as were ſeized in the Anceſtor's Life; but it is clear, that ſuch only of his Lands as were ſo ſeized are in any Caſe liable, whether he claim them in Fee-Simple or Tail, Moore 523. 1 Rol. Rep. 94. Cro. El. 846. Cawley 109, 110, 150, 151, 152. Vide ſupra Sect. 42.

CHAP. XI.

Of the Offence of ſuffering others to be abſent from Church.

HAving ſhewn how far all Perſons in general are puniſhable for their own Abſence from the Church, I am now to ſhew how far they may be puniſhed for the Abſence of others; as to which it is enacted by 3 *Jac.* 1. 4. Par. 32, 33, 34. *That whoſoever ſhall retain or keep in his Service, Fee or Livery, or ſhall willingly maintain, retain, relieve, keep, or harbour, in his Houſe, any Servant, Sojourner, or Stranger, (except a Father or Mother wanting, without Fraud or Covin, other Habitation, or ſufficient Maintenance, and alſo except a Ward, or Perſon committed to the Cuſtody of another by Authority,) who ſhall not go to ſome Church or Chapel, or uſual Place of Common Prayer, to hear Divine Service, but ſhall forbear the ſame for the Space of one Month,* &c. *ſhall for every Month, that he ſhall keep ſuch Servant,* &c. *forfeit ten Pounds.*

CHAP. XII.

Of Popiſh Recuſancy.

AND now we are come to Offences againſt the Eſtabliſhed Church, more immediately relating to thoſe of the Popiſh Religion, for the better underſtanding whereof I ſhall conſider:

1. The above mentioned Offence of not coming to Church, ſo far as it particularly concerns thoſe of this Perſuaſion.
2. The Offence of ſaying or hearing Maſs, or other Popiſh Service.
3. The Offence of not making a Declaration againſt Popery.
4. The Offence of promoting or encouraging the Popiſh Religion.

And firſt as to the ſaid Offence of not coming to Church, ſo far as it particularly concerns thoſe of the Popiſh Religion, who in reſpect hereof are commonly called Popiſh Recuſants, I ſhall conſider;

1. How far ſuch Recuſants are puniſhable in their own Perſons.
2. How far they make others liable to be puniſhed.

As to the firſt of theſe Points, *viz.* How far ſuch Recuſants are puniſhable in their own Perſons, it is to be obſerved, that they are not only liable to all the Forfeitures and Diſabilities, and other Inconveniences mentioned in Chap. 10. but alſo to many particular Diſabilities, Reſtraints and Forfeitures, and other Inconveniences to which no others are liable.

And firſt they are put under the following Diſabilities,

1. That of bringing an Action.

2. That of preſenting to a Church.
3. That of bearing any publick Office, or Charge.
4. That of claiming any Part of a Husband's perſonal Eſtate.
5. That of claiming an Eſtate by Curteſy, or by Way of Dower, after a Marriage againſt Law.

Secondly, They are put under the following Reſtraints,
1. From going above five Miles from Home.
2. From coming to Court.
3. From keeping Arms.
4. From coming within ten Miles of *London*.

Thirdly, They are liable to the following Forfeitures,
1. That of two Parts of a Jointure or Dower.
2. That of twenty Pounds for not receiving the Sacrament yearly after Conformity.
3. That of one hundred Pounds for an unlawful Marriage.
4. That of one hundred Pounds for an Omiſſion of lawful Baptiſm.
5. That of twenty Pounds for an unlawful Burial.

Laſtly, They are ſubject to the following Inconveniences,
1. That their Houſes may be ſearched for Reliques, whether they be Men or Women.
2. If they be Women and married, that they may be committed, *&c.*

Sect. 1. As to the firſt of the ſaid Diſabilities, *viz.* That of bringing an Action, it is enacted by 3 *Jac.* 1. 5. Par. 11, 12. *That every Popiſh Recuſant convict ſhall ſtand to all Intents and Purpoſes diſabled, as a Perſon lawfully excommunicated, and as if ſuch Perſon had been ſo denounced and excommunicated according the Laws of this Realm, until he or ſhe ſhall conform,* &c. *And that every Perſon, ſued by ſuch Perſon ſo diſabled, may plead the ſame in diſabling of ſuch Plaintiff, as if he or ſhe were excommunicated by Sentence in the Eccleſiaſtical Court. Except the Action of ſuch Recuſant do concern ſome Hereditament or Leaſe, which is not to be ſeiſed into the King's Hands, by Force of ſome Law concerning Recuſancy.*

In the Expoſition hereof it hath been reſolved,

Sect. 2. I. That the Plea of ſuch a Conviction, like all other Pleas in Diſability, ought to be pleaded before Imparlance, and alſo to conclude with a Demand if the Plaintiff ſhall be anſwered. Noy 89. Latch 176, 177. Hetl. 18.

Sect. 3. II. That ſuch Plea ought alſo to ſhew before what Juſtices the Conviction was, that the Court may know where to ſend for a Certificate thereof, if it be denied; and alſo that the Record it ſelf, or at leaſt a Certificate thereof, ought to be immediately produced, according to the general Rule of the Law, as to all dilatory Pleas grounded upon Records. Noy 89. Latch 176. 3 Lev. 333, 334.

Sect. 4. III. That if after ſuch a Plea it be certified that the Plaintiff hath conformed, and thereupon the Defendant be ordered to plead in chief, and then the Plaintiff relapſe and be convict again, the Defendant cannot plead the ſame in Diſability a ſecond Time. Hetl. 176.

Sect. 5. IV. That it muſt appear either from the Conviction it ſelf, or by proper Averments, that the Plaintiff is convicted of Popiſh Recuſancy, becauſe no Recuſants, except Popiſh ones, are within the ſaid Clauſe; however that this is ſufficiently ſet forth, by alledging that the Plaintiff being *Papalis Recuſans*, was indicted and convicted *ſecundum formam Statuti, &c.* 3 Lev. 333, 334, 11, 12. * 2 Bul. 155, 156. The ſame Point ſeems admitted, State Trials Vol. 1. fol. 268.

Sect. 6. And ſome have gone ſo far as to hold, That all Popiſh Recuſants convict may be taken up by the Writ * *De Excommunicato capiendo*, and that they are not to be admitted as competent Witneſſes in any Cauſe; Vol. 3. f. 425.

Cauſe; but this ſeems to be a Conſtruction over ſevere: For inaſmuch as
Cawley 216. this, like all other Penal Statutes, ought to be conſtrued ſtrictly, and the Words thereof are no more than, That ſuch Perſons ſhall ſtand diſabled, *&c.* as Perſons lawfully excommunicate, *&c.* and the Purport thereof may be fully ſatisfied by the Diſability to bring any Action, it ſeems to be too rigorous to carry them farther.

Sect. 7. As to the ſecond of the ſaid Diſabilities, *viz.* That of preſenting to a Church, the ſame being at this Day extended by 12 *Ann.* 2. to all Perſons making Profeſſion of the Popiſh Religion, I ſhall refer the Reader, for the Matters relating to this Head, to Chap. 15, wherein is ſhewn how penal it is, barely to profeſs the ſaid Religion; and I ſhall only take Notice in this Place, that by 1 *Gul. & Mar.* 26. Par. 4. *If the Truſtee, Mortgagee, or Grantee of any Avoidance, whereof the Truſt ſhall be for any Popiſh Recuſant convict, ſhall preſent without giving Notice in Writing of the Avoidance, to the Univerſity,* &c. *within three Months after the Avoidance, he forfeits five hundred Pounds.*

Sect. 8. As to the third of the ſaid Diſabilities, *viz.* That of bearing any publick Office or Charge, it is enacted by 3 *Jac.* 1. 5. Par. 9. *That no Popiſh Recuſant convict ſhall exerciſe any publick Office, or Charge, in the Commonwealth, but ſhall be utterly diſabled to exerciſe the ſame, by himſelf or his Deputy.*

Sect. 9. It is obſervable, that this Clauſe is more ſtrongly penned than that, which immediately precedes it, relating to all Recuſants in general, as to the following Particulars:

1. That this extends to all publick Offices and Charges in general, whereas the former extends only to thoſe, which are particularly enumerated.

2. That this expreſly diſables a Popiſh Recuſant to exerciſe ſuch an Office by himſelf or his Deputy, but the other ſays nothing at all of the Exerciſe of an Office by a Deputy.

Sect. 10. As to the Fourth of the ſaid Diſabilities, *viz.* That of claiming any Part of a Husband's perſonal Eſtate, it is enacted by 3 *Jac.* 1. 5. Par. 10. *That every Woman being a Popiſh Recuſant convict, (her Huſband not ſtanding convicted of Popiſh Recuſancy) which ſhall not conform her ſelf and remain conform'd, but ſhall forbear to repair to ſome Church or uſual Place of Common Prayer, and there hear Divine Service and Sermon, if any then be, and receive the Sacrament of the Lord's Supper, according to the Laws of this Realm, by the Space of one whole Year next before the Death of her ſaid Husband, ſhall not only be diſabled to be Executrix or Adminiſtratrix of her ſaid Huſband, but alſo to have or demand any Part of her ſaid Husband's Goods or Chattels, by any Law, Cuſtom or Uſage whatſoever*; and by 3 Jac. 1. 5. Par. 13. *Every Woman is put under the like Diſability, being a Popiſh Recuſant, who ſhall be married otherwiſe than according to the Church of* England.

Sect. 11. As to the Fifth of the ſaid Diſabilities, *viz.* That of claiming an Eſtate by the Curteſy, or by Way of Dower, *&c.* it is enacted by 3 *Jac.* 1. 5. Par. 13. *That every Man, who being a Popiſh Recuſant convict, ſhall be married otherwiſe than in ſome open Church or Chapel, and otherwiſe than according to the Orders of the Church of* England *by a Miniſter lawfully authorized, ſhall be diſabled to have any Eſtate, as Tenant by the Curteſy; and that every Woman being a Popiſh Recuſant convict, who ſhall be married in other Form than as aforeſaid, ſhall be diſabled to claim her Dower or Jointure, or Widow's Eſtate,* &c.

Sect. 12. As to the firſt of the above mentioned Reſtraints, *viz.* That from going above five Miles from Home, *&c.* it is enacted by 35 *El.* 2. and 3 *Jac.* 1. 5. Par. 6, 7. *That every Popiſh Recuſant convict ſhall repair to*

his Place of Dwelling, &c. *and not remove above five Miles from thence, unleſs he be urged by Proceſs*, &c. *or have a Licence from the Privy Council*, &c. *or under the Hands and Seals of four Juſtices of Peace, with the Aſſent in Writing of the Lieutenant of the County, or of the Biſhop*, &c. (*Every Licence of which Kind by Juſtices of Peace muſt expreſs both the particular Cauſe and the Time for which it is given, and ought not to be granted without a previous Oath of ſome reaſonable Cauſe,*) *under Pain of forfeiting all his Goods and Hereditaments*, (*whether Freehold or Copyhold,*) *for his Life, or of abjuring the Realm, if he be not worth twenty Marks a Year, or forty Pounds in Goods, unleſs he recant before Conviction, and alſo continue conformable.* See Cawley 128, 129, &c. 207, 208.

Sect. 13. Note, That the Privy Council may grant ſuch Licence without any Special Cauſe or Oath, &c. but that the Juſtices of Peace cannot: And it hath been reſolved, That in Pleading a Licence of Juſtices of Peace, you muſt expreſly ſhew, that it was made under their Hands and Seals, and alſo ſet forth the Cauſe in particular for which it was granted, and the Time for which it was limited, and that the Party was ſworn to the Truth of ſuch Cauſe, &c. Cro. Jac. 352. 1 Rol. Re. 108. Moor 836.

Sect. 14. It is ſaid, That if the ſame Perſon be both a Juſtice of Peace and a Lieutenant, he cannot both join in a Licence as Juſtice of Peace, and alſo give his Aſſent as Lieutenant, but can only act in one Capacity. Cro. Ja. 352. 1 Rol. Re. 108. Moor 836.

Sect. 15. It ſeems that the Miles ſhall be computed according to the *Engliſh* Manner, allowing 5280 Foot, or 1760 Yards to each Mile, and that the ſame ſhall be reckoned not by ſtrait Lines, as a Bird or Arrow may fly, but according to the neareſt and moſt uſual Way. Cawley 130, 131. Cro. El. 212.

Sect. 16. As to the Second of the above mentioned Reſtraints, *viz.* That which relates to the coming to Court, it is enacted by 3 *Jac.* 1. 5. Par. 2. *That no Popiſh Recuſant convict ſhall come into the Court or Houſe, where the King or his Heir apparent ſhall be, unleſs he be commanded ſo to do by the King, upon Pain of one hundred Pounds*, &c. And it is farther enacted by 30 *Car.* 2. St. 2. Par. 5, 6. *That every Popiſh Recuſant convict, who ſhall come adviſedly into, or remain in the Preſence of the King or Queen, or ſhall come into the Court or Houſe, where they or any of them reſide, ſhall be diſabled to hold or execute any Office or Place of Truſt Civil or Military, or to ſue in Law or Equity, or to be an Executor*, &c. *or capable of any Legacy or Deed of Gift, and ſhall forfeit for every wilful Offence five hundred Pounds, unleſs ſuch Perſon do within the Term next after ſuch his coming or remaining, take the Oaths of Allegiance and Supremacy, and make the Declaration againſt Tranſubſtantiation and the Invocation of Saints*, &c. *in the Court of Chancery.*

Sect. 17. As to the Third of the above mentioned Reſtraints, *viz.* That which relates to the keeping of Arms, it is enacted by 3 *Jac.* 1. 5. Par. 27, 28, 29. *That all ſuch Armour, Gun-powder, and Munition of whatſoever Kinds, as any Popiſh Recuſant convict ſhall have in his own Houſe or elſewhere, or in the Poſſeſſion of any other at his Diſpoſition, ſhall be taken from him by Warrant of four Juſtices of Peace at their General or Quarter-Seſſions*, (*except ſuch neceſſary Weapons, as ſhall be allowed him by the ſaid four Juſtices, for the Defence of his Perſon or Houſe*) *and that the ſaid Armour*, &c. *ſo taken, ſhall be kept at the Coſts of ſuch Recuſant, in ſuch Place as the ſaid four Juſtices at their ſaid Seſſions ſhall appoint: And that if any ſuch Recuſant having ſuch Armour*, &c. *or if any other Perſon who ſhall have any ſuch Armour*, &c. *to the Uſe of ſuch Recuſant, ſhall refuſe to diſcover to the ſaid Juſtices, or any of them, what Armour he hath, or ſhall let or hinder the Delivery thereof to any of the ſaid Juſtices, or to any other Perſon authorized by their Warrant to take the ſame, that then every Perſon ſo offending ſhall forfeit his ſaid Armour*, &c. *and*

alſo be impriſoned for three Months without Bail, by Warrant from any Juſtices of Peace of ſuch County. And it is farther enacted, *That notwithſtanding the taking away ſuch Armour,* &c. *yet ſuch Recuſant ſhall be charged with the maintaining of the ſame, and with the providing of a Horſe,* &c. *in ſuch Sort as others of his Majeſty's Subjects.* Alſo it is farther enacted by 1 *Will. & Mar.* 15. *That no reputed Papiſt refuſing to make the ſaid Declaration againſt Popery, mentioned in* 30 Car. *ſhall keep Arms*; as is ſet forth more at large *Chap.* 14. *Sect.* 4.

Sect. 18. As to the fourth of the above mentioned Reſtraints, *viz.* That which relates to the coming within ten Miles of *London*, it is enacted by 3 *Jac.* 1. 5. Par. 4, 5. *That no Popiſh Recuſant, &c. ſhall remain within the Compaſs of ten Miles of* London *under Pain of one hundred Pounds, except ſuch Perſons as at the Time of the ſaid Act did uſe ſome Trade, Myſtery, or manual Occupation in* London, *&c. and ſuch as ſhall have their only Dwelling in* London, *&c.* Alſo reputed Papiſts, refuſing to make the Declaration mentioned in the precedent Sections, are to be removed from *London*, &c. by Force of 1 *Will. & Mar.* 9. which is ſet forth more at large in *Cha.* 14. *Sect.* 3.

Sect. 19. As to the firſt of the above mentioned Forfeitures, *viz.* That of two Parts of a Jointure or Dower, it is enacted by 3 *Jac.* 1. 5. Par. 10. *That every married Woman being a Popiſh Recuſant convict, (her Husband not ſtanding convicted of Popiſh Recuſancy) who ſhall not conform her ſelf and remain conformed, but ſhall forbear to repair to ſome Church or uſual Place of Common Prayer, and there to hear Divine Service and Sermon, if any then be, and receive the Sacrament of the Lord's Supper, according to the Laws of this Realm, within one Year next before the Death of her ſaid Husband, ſhall forfeit to the King the Profits of two Parts of her Jointure and Dower of any Hereditaments of her ſaid Husband,* &c.

Sect. 20. As to the ſecond of the above mentioned Forfeitures, *viz.* That of twenty Pounds, *&c.* for not receiving the Sacrament yearly after Conformity, it is enacted by 3 *Jac.* 1. 4. Par. 2, 3. *That if any Popiſh Recuſant convict, who hath conformed himſelf to the Church,* &c. *ſhall not receive the Sacrament in his own Pariſh-Church,* &c. *within one Year after his Conformity, he ſhall forfeit twenty Pounds, and for the ſecond Year forty Pounds, and for every Year after ſixty Pounds,* &c.

Sect. 21. As to the third of the above mentioned Forfeitures, *viz.* That of one hundred Pounds for an unlawful Marriage, it is enacted by 3 *Jac.* 1. 5. Par. 13. *That every Popiſh Recuſant convict, who ſhall be married to a Woman who is no Inheritrix, otherwiſe than according to the Church of* England, *ſhall forfeit one hundred Pounds.*

Sect. 22. As to the fourth of the above mentioned Forfeitures, *viz.* That of one hundred Pounds for the Omiſſion of a lawful Baptiſm, it is enacted by 3 *Jac.* 1. 5. Par. 14. *That every Popiſh Recuſant, who ſhall not cauſe his or her Child to be baptized, within one Month after its Birth, by a lawful Miniſter,* &c. *ſhall forfeit one hundred Pounds,* &c.

Sect. 23. As to the fifth of the above mentioned Forfeitures, *viz.* That of twenty Pounds for an unlawful Burial, it is enacted by 3 *Jac.* 1. 5. Par. 15. *That if any Popiſh Recuſant not being excommunicate, ſhall be buried in any other Place than in the Church or Church-yard, or not according to the Eccleſiaſtical Laws of this Realm, the Executors,* &c. *of ſuch Recuſant, knowing the ſame, or the Party that cauſeth him to be ſo buried, ſhall forfeit twenty Pounds,* &c.

Sect. 24. As to the Inconvenience to which all ſuch Offenders are liable, *viz.* That of having their Houſes ſearched for Reliques, *&c.* is

it is enacted by 3 *Jac.* 1. 5. Par. 26. *That any two Juſtices of Peace, and all Mayors, Bailiffs, and chief Officers of Cities, and Towns Corporate, in their reſpective Juriſdictions, may ſearch the Houſe and Lodgings of every Popiſh Recuſant convict for Popiſh Books and Reliques; and that if any Altar, Pix, Beads, Pictures, or ſuch like Popiſh Relique, or any Popiſh Book, be found in the Cuſtody of ſuch Perſon, as in the Opinion of the ſaid Juſtices,* &c. *ſhall be unmeet for him or her to have or uſe, it ſhall be defaced and burnt, if it be meet to be burnt; and if it be a Crucifix or other Relique of any Price, the ſame ſhall be defaced at the General Quarter-Seſſions in the County where it ſhall be found, and then reſtored to the Owner.*

Sect. 25. As to the Inconvenience to which ſuch Offenders being Femes-Covert are liable, *viz.* that of being committed, it is enacted by 7 *Jac.* 1. 6. Par. 28. *That if any married Woman, being a Popiſh Recuſant convict, ſhall not within three Months after her Conviction conform her ſelf and repair to Church and receive the Sacrament,* &c. *ſhe may be committed to Priſon by one of the Privy Council, or by the Biſhop, if ſhe be a Baroneſs; or if under that Degree by two Juſtices of Peace whereof one to be of the* Quorum, *there to remain till ſhe perform,* &c. *unleſs the Husband will pay to the King ten Pounds a Month for her Offence, or elſe the third Part of all his Lands,* &c. *at the Choice of the Husband,* &c.

Sect. 26. And now I am to conſider in the ſecond Place, how far ſuch Recuſants make others liable to be puniſhed; as to which it is to be obſerved, That the Husband of a Popiſh Recuſant convict is not only liable to the Forfeiture of ten Pounds a Month for the Abſence of any of his Servants from Church, by Force of 1 *Jac.* 1. which is ſet forth more at large in the foregoing Chapter, *But is alſo utterly diſabled by the ninth Paragraph of the ſaid Statute, to exerciſe any Publick Office or Charge in the Common-wealth by himſelf or by his Deputy; (except ſuch Husband himſelf, and his Children, which ſhall be above the Age of nine Years abiding with him, and his Servants in Houſhold, ſhall once every Month at leaſt, not having any reaſonable Excuſe to the Contrary, repair to ſome Church or Chapel uſual for Divine Service, and there hear Divine Service; and the ſaid Husband, and ſuch his Children and Servants, as are of meet Age, receive the Sacrament of the Lord's Supper, at ſuch Times as are limited by the Laws of this Realm, and do bring up his ſaid Children in the true Religion.)*

Sect. 27. Alſo it is farther enacted by the ſaid Statute of 3 *Jac.* 1. 5. Par. 26. *That the Houſe of one whoſe Wife is a Popiſh Recuſant convict, may be ſearched by any two Juſtices of Peace,* &c. *for Popiſh Books,* &c.

CHAP. XIII.

Of Offences in ſaying or hearing Maſs or other Popiſh Service.

Sect. 1. AS to the Offence in ſaying or hearing Maſs, it is enacted by 23 *El.* 1. Par. 4. *That every Perſon who ſhall ſay or ſing Maſs, being thereof lawfully convict, ſhall forfeit two hundred Marks, and be committed to Priſon in the next Gaol, there to remain by the Space of one Year, and from thenceforth till he have paid the ſaid Sum of two hundred Marks; and*

and that every Perſon, who ſhall willingly hear Maſs, ſhall forfeit the Sum of one hundred Marks, and ſuffer a Year's Impriſonment.

Sect. 2. And it is enacted by 11 & 12 *Will.* 3. 4. Par. 2, 3, 4, 5. *That every Perſon, who ſhall apprehend any Popiſh Biſhop, Prieſt or Jeſuit, and proſecute him to Conviction for ſaying Maſs, or exerciſing any other Part of the Function of a Popiſh Biſhop or Prieſt, ſhall receive one hundred Pounds of the Sheriff, and that every ſuch Popiſh Biſhop,* &c. (*except, being a Foreigner, he be entered in the Secretary's Office, and officiate only in the Houſe of a Foreign Miniſter,*) *ſhall be adjudged to perpetual Impriſonment.*

CHAP. XIV.

Of the Offence of not making a Declaration againſt Popery.

THE Offence of refuſing to make a Declaration againſt ſome of the Principal Doctrines of the Popiſh Religion puts all Perſons under the following Reſtraints:

1. From ſitting in Parliament.
2. From holding a Place at Court.
3. From living within ten Miles of *London.*
4. From keeping Arms.

Alſo it puts them under a Diſability of preſenting to a Church.

Sect. 1. As to the firſt of the above mentioned Reſtraints, *viz.* That which relates to the ſitting in Parliament, it is enacted by 30 *Car.* 2. Stat. 2. Chap. 1. *That no Peer ſhall vote or make his Proxy in the Houſe of Peers, or ſit there during any Debate; and that no Member of the Houſe of Commons ſhall vote or ſit there during any Debate after the Speaker is choſen, until ſuch Peer or Member ſhall take the Oaths of Allegiance and Supremacy, and make a Declaration of his Belief that there is no Tranſubſtantiation in the Sacrament of the Lord's Supper; and that the Invocation or Adoration of the Virgin* Mary, *or any other Saint, and the Sacrifice of the Maſs, as they are now uſed in the Church of* Rome, *are Superſtitious and Idolatrous,* &c. *on Pain that every ſuch offender ſhall be adjudged a Popiſh Recuſant convict, and diſabled to hold or execute any Office,* &c. *or from thenceforth to ſit or vote in either Houſe of Parliament, to ſue in Law or Equity, or to be Guardian, Executor or Adminiſtrator, or capable of any Legacy or Deed of Gift, and ſhall forfeit for every wilful Offence five hundred Pounds.*

Sect. 2. As to the ſecond of the above mentioned Reſtraints, *viz.* That which relates to the holding a Place at Court, it is enacted by the ſaid Statute of 30 *Car.* 2. Stat. 2. Par. 9, 12, 13. *That every Perſon who ſhall be a ſworn Servant to the King, ſhall take the ſaid Oaths, and make and ſubſcribe the ſaid Declaration in Chancery, the next Term after he ſhall be ſo ſworn a Servant,* &c. *And that if any ſuch Perſon, neglecting ſo to do, ſhall adviſedly come into or remain in the Preſence of the King or Queen, or ſhall come into the Court or Houſe where they are or any of them reſide, he ſhall ſuffer all the Penalties expreſſed in the foregoing Section, unleſs ſuch Perſon ſo coming into*

the King's Preſence, &c. *ſhall firſt have Licence ſo to do, by Warrant under the Hands and Seals of ſix Privy Counſellors, by Order of the Privy Council, upon ſome urgent Occaſion therein to be expreſſed, which Licence ſhall not exceed ten Days, and ſhall be firſt filed*, &c. *in the Petty-Bag Office, for any Body to view without Fee*, &c. *and no Perſon be licenced for above thirty Days in one Year.*

Sect. 3. As to the third of the above mentioned Reſtraints, *viz.* That which relates to the living within ten Miles of *London*, it is enacted by 1 *Will. & Mar.* 9. *That every Juſtice of Peace in* London *and* Weſtminſter, *and within ten Miles thereof, ſhall cauſe to be arreſted and brought before him all reputed Papiſts, (except Foreigners, being Merchants, or menial Servants to ſome Ambaſſadour or publick Agent, and except all ſuch as uſed ſome Trade, Myſtery, or ſome manual Occupation at the Time of the ſaid Act, in* London, &c. *and alſo except all ſuch Perſons as had their Dwelling in* London, &c. *within ſix Months before the thirteenth of* February 1688. *and no Dwelling elſewhere, and certified their Names to the Seſſions before the firſt of* Auguſt 1689) *and that every ſuch Juſtice ſhall tender the ſaid Declaration to every ſuch Perſon, and that every ſuch Perſon refuſing the ſame, and afterwards remaining in* London, &c. *or within ten Miles thereof, or being certified to the King's Bench or Quarter-Seſſions, at the next Term or Seſſions, as having refuſed to make the ſaid Declaration, and neglecting to make the ſame in ſuch Court, ſhall ſuffer as a Popiſh Recuſant convict*, &c.

See Ch. 12. S. 18.

Sect. 4. As to the fourth of the above mentioned Reſtraints, *viz.* That which relates to the keeping Arms, it is enacted by 1 *Will. & Mar.* 15. *That any two Juſtices of Peace may and ought to tender the ſaid Declaration to any Perſon whom they ſhall know or ſuſpect, or have Information of, as being a Papiſt, or ſuſpected to be ſuch; and that no ſuch Perſon ſo required, and not making and ſubſcribing the ſaid Declaration, or not appearing before the ſaid Juſtices upon Notice to him given, or left at his uſual Abode, by one authorized by Warrant under the Hands and Seals of the ſaid Juſtices, ſhall keep any Arms or Ammunition, or Horſe above the Value of five Pounds, in his own Poſſeſſion, or in the Poſſeſſion of any other Perſon to his Uſe, (other than ſuch neceſſary Weapons, as ſhall be allowed him by the Quarter-Seſſions for the Defence of his Houſe or Perſon) and that any two Juſtices of Peace, by Warrant under their Hands and Seals, may authorize any Perſon in the Day-time, with the Aſſiſtance of the Conſtable or his Deputy or the Tithing-man, to ſearch for all ſuch Arms*, &c. *and Horſes, and ſeize them to the King's Uſe, and that the ſaid Juſtices ſhall deliver the ſaid Arms and Ammunition at the next Quarter-Seſſions in open Court, and that whoever ſhall conceal*, &c. *or ſhall be aiding to the concealing any ſuch Arms or Horſes, ſhall be committed to the common Gaol by Warrant under the Hands and Seals of any two Juſtices of Peace, and alſo forfeit treble the Value; and that thoſe who diſcover any ſuch Arms or Ammunition, ſo as the ſame may be ſeized, ſhall have the full Value thereof, to be awarded to them by the Seſſions*, &c. *and that ſuch Refuſers of the ſaid Declaration*, &c. *ſhall be diſcharged whenever they ſhall make the ſame.*

See Ch. 12. S. 17.

Sect. 5. As to the above mentioned Diſability of preſenting to a Church, it is enacted by 1 *Will. & Mar.* 26. That whoever ſhall refuſe to make the ſaid Declaration upon ſuch a Tender thereof as is preſcribed by the ſaid Act, ſhall be diſabled to preſent to any Benefice, *&c.* But it ſeems needleſs to ſet forth the Clauſe of the ſaid Statute relating to this Matter at large in this Place, inaſmuch, as by 12 *Annæ* 14. All Perſons whatſoever making Profeſſion of the Popiſh Religion are under the like Diſability, as will appear from *Ch.* 15. *Sect.* 6, 7, *&c.*

CHAP. XV.

Of Offences in promoting or encouraging the Popiſh Religion.

OFFENCES in promoting or encouraging the Popiſh Religion ſeem to be reducible to the following Heads;

1. Giving or Receiving Popiſh Education.
2. Profeſſing the Popiſh Religion.
3. Buying or Selling Popiſh Books.

Sect. 1. The firſt Offence of this Kind, *viz.* That of giving or receiving Popiſh Education depends upon ſeveral Statutes; and firſt it is enacted by 1 *Jac.* 1. 4. Par. 6, 7. *That if any Perſon or Perſons under the King's Obedience ſhall go, or ſend or cauſe to be ſent, any Child or any other Perſon under their or any of their Government, beyond the Seas, out of the King's Obedience, to the Intent to enter into, or reſide in, or repair to any College,* &c. *of any Popiſh Order, Profeſſion or Calling, to be inſtructed, perſwaded, or ſtrengthned in the Popiſh Religion, or in any ſort to profeſs the ſame, every ſuch Perſon ſo ſending ſuch Child,* &c. *ſhall forfeit* 100 *l. And every ſuch Perſon ſo paſſing or being ſent,* &c. *ſhall in reſpect of him or herſelf only, and not in reſpect of any of his Heirs or Poſterity, be diſabled to inherit, purchaſe, take, have or enjoy, any Profits, Hereditaments, Chattels, Debts, Legacies or Sums of Money,* &c. *whatſoever: And that all Eſtates, Terms, and other Intereſts whatſoever to be made, ſuffered or done, to the Uſe or Behoof of any ſuch Perſon, or upon any Truſt or Confidence, mediately or immediately to or for the Benefit or Relief of any ſuch Perſon, ſhall be utterly void.*

Sect. 2. And it is farther enacted by 3 *Jac.* 1. 5. Par. 16. *That if the Children of any Subject within the Realm (the ſaid Children not being Soldiers, Mariners, Merchants, or their Apprentices or Factors) ſhall be ſent or go beyond Sea, to prevent their good Education in* England, *or for any other Cauſe, without the Licence of the King or ſix of his Privy Council (whereof the Principal Secretary to be one) under their Hands and Seals, that then every ſuch Child ſhall take no Benefit by any Gift, Conveyance, Deſcent, Deviſe or otherwiſe of or to any Hereditament or Chattel, till ſuch Child being of the Age of eighteen Years or above, take the Oath of Obedience before ſome Juſtice of Peace of the County, Liberty or Limit, where the Parent of ſuch Child did and ſhall inhabit: And that in the mean Time the next of Kin to ſuch Child, who ſhall be no Popiſh Recuſant, ſhall have the ſaid Hereditaments,* &c. *ſo given,* &c. *until ſuch Child ſhall conform,* &c. *and take the ſaid Oath and receive the Sacrament; and that after ſuch Conformity,* &c. *he who hath received the Profits of the ſaid Hereditaments,* &c. *ſhall accompt for the ſame, and in reaſonable Time make Payment thereof, and reſtore the Value of the ſaid Goods,* &c. *And that whoever ſhall ſend ſuch Child over Seas, ſhall forfeit one hundred Pounds,* which by 11 & 12 *Will.* 3. 4. Par. 6. *ſhall be to the ſole Uſe and Benefit of the Perſon who ſhall diſcover the Offence.*

Sect. 3. Alſo it is enacted by 3 *Car.* 1. 2. *That if any Perſon under the Obedience of the King ſhall go, or ſhall convey or ſend, or cauſe to be ſent or conveyed,*

veyed, any Perſon out of the King's Dominions, into any Parts beyond the Seas, out of the King's Obedience, to the Intent to enter into, or be reſident or trained up, in any Priory, Abbey, Nunnery, Popiſh Univerſity, College or School, or Houſe of Jeſuits, Prieſts, or in a private Popiſh Family, and ſhall be there by any Popiſh Perſon inſtructed, perſwaded or ſtrengthened in the Popiſh Religion in any Sort to profeſs the ſame, or ſhall convey or ſend, or cauſe to be conveyed or ſent, any Thing towards the Maintenance of any Perſon ſo going or ſent, and trained and inſtructed, as is aforeſaid, or under the Colour of any Charity towards the Relief of any Priory, &c. or religious Houſe whatſoever; every Perſon ſo ſending, &c. any ſuch Perſon or Thing, and every Perſon paſſing or ſent, being thereof convicted, &c. ſhall be diſabled to proſecute any Suit in Law or Equity, or to be Executor or Adminiſtrator to any Perſon, or capable of any Legacy or Deed of Gift, or to bear any Office within the Realm. And ſhall forfeit all his Goods and Chattels, and ſhall forfeit all his Hereditaments, Offices and Eſtates of Freehold, during his Life.

The ſecond Offence of this Kind, *viz.* That of profeſſing the Popiſh Religion is puniſhed with the following Diſabilities,

1. Of taking an Eſtate in Lands.
2. Of preſenting to a Church.

Alſo it is puniſhed with the following Reſtraints,

1. From keeping School.
2. From with-holding a competent Maintenance from a Proteſtant Child.

Sect. 4. As to the firſt of the above mentioned Diſabilities, *viz.* That of taking an Eſtate in Lands, it is enacted by 11 & 12 *W.* 3. c. 4. *That every Perſon educated in or profeſſing the Popiſh Religion, who ſhall not within ſix Months after the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and ſubſcribe the Declaration againſt Popery mentioned in* 30 Car. 2. *Stat.* 2. *Chap.* 1. *in the Chancery, or King's Bench, or Quarter-Seſſions of the County where ſuch Perſon ſhall reſide, ſhall in Reſpect of himſelf or herſelf only, and not in Reſpect of any of his or her Heirs or Poſterity, be diſabled to inherit or take by Diſcent, Deviſe or Limitation, in Poſſeſſion, Reverſion or Remainder, any Lands, Tenements or Hereditaments, in* England *or* Wales, &c. *And during the Life of ſuch Perſon, and until he take the ſaid Oaths,* &c. *his next of Kin being a Proteſtant, ſhall enjoy the ſame, without being accomptable for the Profits, but ſhall not do wilful Waſte under Pain of forfeiting treble Damages to the Party ſo diſabled: And all Papiſts, or Perſons making Profeſſion of the Popiſh Religion, are diſabled to purchaſe in their own Names, or the Names of others, to their Uſe or in Truſt for them: And all Eſtates, Terms and other Intereſt and Profits whatſoever, out of Lands made to their Uſe, or on any Truſt, mediately or immediately, for their Benefit, are void.* [6]

Sect. 5. In the Conſtruction hereof it was reſolved by the Houſe of Lords in *Roper's* Caſe, That the Deviſe of the Reſidue of Money ariſing from the Sale of an Eſtate appointed to be ſold for Payment of Debts, *&c.* is within the Statute.

Sect. 6. As to the ſecond of the above mentioned Diſabilities, *viz.* That of preſenting to a Church, which by 3 *Jac.* 1. 5. Par. 18, 19, 20, 21. and 1 *Will. & Mar.* 26. did extend only to Popiſh Recuſants convict, and Perſons refuſing to make the Declaration againſt Popery, mentioned in 30 *Car.* 2. Stat. 2. it is enacted by 12 *Ann.* St. 2. c. 14. *That every Papiſt, or Perſon making Profeſſion of the Popiſh Religion,* &c. *and every Mortgagee, Truſtee, or Perſon any ways intruſted by or for ſuch Papiſt,* &c. *with or without Writing, ſhall be diſabled to preſent to any Benefice, School, or Hoſpital,* &c. *or*

Precedent of a Title made under theſe Statutes. Lut. 1101.

See 11 Geo. 2. c. 17. *or to grant any Avoidance of any Benefice, Prebend or Eccleſiaſtical Living; and that in all Caſes the Univerſities ſhall preſent.*

Sect. 7. Alſo by Force of the ſaid Statute, *The Ordinary may tender the Declaration againſt Tranſubſtantiation to any reputed Papiſt making a Preſentation, and upon a Refuſal to take the ſame, the Preſentation ſhall be void: Alſo the Ordinary may examine every Preſentee upon Oath, Whether the Perſon who preſented him, be the true Patron, or only a Truſtee? And the Court wherein a* Quare Impedit *ſhall be brought, may in like Manner examine the Parties, and a Bill may be brought in any Court of Equity to diſcover ſuch ſecret Truſts,* &c. *and the Anſwer of ſuch Perſons upon any ſuch Examination or Bill ſhall be good Evidence againſt ſuch Patron, in Reſpect of ſuch a Preſentation, but not as to any other Purpoſe.*

Sect. 8. I do not know that any Reſolution hath been given on either of the above mentioned Statutes of 1 *Will. & Mar.* or 12 *Ann.* However the Expoſitions which were made on 3 *Jac.* 1. ſeeming to be for the moſt part applicable to theſe latter Statutes alſo, I ſhall take Notice of the principal of them; as,

Sect. 9. I. That where a Preſentment is *pro hac vice* veſted in the Univerſity by reaſon of the Patron's being a Popiſh Recuſant at the Time when the Church became void, it ſhall not be deveſted again by his conforming himſelf to the Church.

10 Co. 57. b.

Sect. 10. II. That ſuch a Patron is only diſabled to preſent, and that he continues Patron as to all other Purpoſes, and therefore that he ſhall confirm the Leaſes of the Incumbent, *&c.*

Cawley 230.

Sect. 11. III. That ſuch a Perſon by being diſabled to grant an Avoidance, is no way hindred from granting the Advowſon itſelf in Fee, or for Life or Years, *bona Fide*, and for good Conſideration.

1 Jon. 19, 20.

Sect. 12. IV. That if an Advowſon or Avoidance belonging to ſuch a Perſon come into the King's Hands, by reaſon of an Outlawry, or Conviction of Recuſancy, *&c.* the King, and not the Univerſity, ſhall preſent.

1 Jon. 20, 21, &c.
Hob. 126, 127.
Mo. 872.

Sect. 13. As to the firſt of the above mentioned Reſtraints, *viz.* that which relates to the keeping School, it is enacted by the ſaid Statute of 11 & 12 *Will.* 3. 4. Par. 3. *That if any Papiſt, or Perſon making Profeſſion of the Popiſh Religion, ſhall be convict of keeping School, or taking upon themſelves the Education or Government, or Boarding of Youth in any Place within this Realm, or the Dominions thereunto belonging, they ſhall be adjudged to perpetual Impriſonment.*

Sect. 14. As to the ſecond of the above mentioned Reſtraints, *viz.* that which relates to the Power of a Popiſh Parent over his Proteſtant Child, it is enacted by the ſaid Statute of 11 & 12 *Will.* 3. 4. *That if any Popiſh Parent, in order to compel a Proteſtant Child to a Change of Religion, ſhall refuſe to allow ſuch Child a ſufficient Maintenance, ſuitable to the Degree and Ability of ſuch Parent, and to the Age and Education of ſuch Child, the Lord Chancellor upon Complaint may make ſuch Order therein, as ſhall be agreeable to the Intent of the ſaid Act.*

Sect. 15. The third Offence of this Kind, *viz.* that of ſelling or buying Popiſh Books depends upon 3 *Jac.* 1. 5. Par. 25. by which it is enacted, *That no Perſon ſhall bring from beyond the Seas, nor ſhall print, buy or ſell any Popiſh Primers, Ladies Pſalters, Manuals, Roſaries, Popiſh Catechiſms, Miſſals, Breviaries, Portals, Legends and Lives of Saints, containing ſuperſtitious Matter, printed or written in any Language whatſoever, nor any other ſuperſtitious Books, printed or written in the* Engliſh *Tongue; on pain of forfeiting forty Shillings for every Book,* &c. *and the Books to be burnt.*

CHAP. XVI.

Of Offences against the Eſtabliſhed Church by Proteſtant Diſſenters.

Sect. 1. BY 31 *El.* 1. *Obſtinate Nonconformiſts were compellable to abjure the Realm, and were alſo ſubject to all the Penalties mentioned in the tenth and eleventh Chapters of this Book; and Diſſenters were farther reſtrained by* 17 Car. 2. 2. & 22 Car. 2. 1. but at this Day by 1 *Will. & Mar.* 18. Par. 2. *All Perſons diſſenting from the Church, (except Papiſts, and thoſe who ſhall in Preaching or Writing deny the Doctrine of the Trinity,) are exempted from all Penal Laws relating to Religion, except* 25 Car. 2. *Chap.* 2. *(by which all Officers of Truſt are bound to receive the Sacrament according to the Uſage of the Church of* England, *and alſo to take the Oaths of Allegiance and Supremacy, and the Teſt;) and alſo except* 30 Car. 2. *Stat.* 2. *Chap.* 1. *(by which the Members of both Houſes of Parliament, and all the King's Sworn Servants are bound to make a Declaration againſt Tranſubſtantiation and the Invocation of Saints, and the Sacrifice of the Maſs,) provided ſuch Diſſenters take the Oaths of Allegiance and Supremacy, and make the ſaid Declaration againſt Tranſubſtantiation,* &c. *and come to ſome Congregation for religious Worſhip in ſome Place regiſtred either in the Biſhop's Court, or at Seſſions, the Doors whereof ſhall neither be locked, barred, nor bolted.*

Vide 2 Jones 225, 226, 233, 234. Par. 17.

Vide ſupra, Ch. 8.

Salk. 572.

Par 16, 17, 19.

Sect. 2. Alſo by Par. 8, 9, 10, 11, 12. *Diſſenting Teachers are tolerated, if they take the ſaid Oaths,* &c. *at the General or Quarter-Seſſions to be held for the Place where ſuch Perſons live, and ſubſcribe the thirty nine Articles of the Church of* England, *except thoſe few ſcrupled ones concerning Church-Government and Infant-Baptiſm:* And by 10 *Ann.* 2. Par. 7, 8, 9. *They may qualify themſelves as well during a Proſecution upon any Penal Statute, as before, and being qualified in one County may officiate in another, upon producing a Certificate and taking the ſaid Oaths,* &c. *if required.*

Vide Salk. 572.

Sect. 3. Alſo by the ſaid Statute of 1 *Will. & Mar.* Par. 13, 14, 15. *Thoſe who ſcruple the taking of any Oath, are within the like Indulgence, provided they ſubſcribe the aforeſaid Declaration, and alſo a Declaration of Fidelity to the King, and againſt the depoſing Doctrine and Papal Supremacy; and alſo profeſs their Faith in God the Father, and Jeſus Chriſt his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the Holy Scriptures of the Old and New Teſtament to be given by Divine Inſpiration.*

Sect. 4. Since this Statute a Prohibition lies to the Spiritual Court proceeding againſt Perſons for Incontinency, who have been married in a licenſed Conventicle.

3 Levinz 376.

CHAP. XVII.

Of High Treaſon.

OF Offences more immediately againſt Man, ſome are more immediately againſt the King, others more immediately againſt the Subject.

Offences more immediately againſt the King are either Capital or not Capital.

The Capital Offences of this Nature are either High Treaſon or Felonies.

Sect. 1. And firſt of High Treaſon, concerning which, before 25 *Ed.* 3. 2. there was great Diverſity of Opinions, and many Offences were taken to be included in it, beſides thoſe expreſſed in the ſaid Statute; as the killing of the King's [a] Father or Brother, or even of his [b] Meſſenger; producing the [c] Pope's Bull of Excommunication, and pleading it in Diſability; refuſing to accuſe a Man in the King's Courts, and [d] ſummoning him to appear, and defend himſelf before a foreign Prince, and other ſuch like Acts tending to diminiſh the Royal Dignity of the Crown.

[a] 3 Inſt. 7.
[b] 22 Aſſ. 49.
[c] 30 Aſſ. 19. Bro. Trea. 14.
[d] 3 Inſt. 7. S. P. C. 1. b. See 1 H. H. P. C. 76 to 87.

Sect. 2. But all Treaſons were ſettled by the ſaid Statute of 25 *Ed.* 3. 1. which by 1 *Mar.* Seſ. 1 Chap. 1. was re-inforced, and again made the only Standard of Treaſon; and all Statutes between the ſaid Statutes of 35 *Ed.* 3. and 1 *Mar.* which made any Offences High or Petit Treaſon, or Miſpriſion of Treaſon, are abrogated, ſo that no Offence is at this Day to be eſteemed High Treaſon, unleſs it be either declared to be ſuch by the ſaid Statute of 25 *Ed.* 3. or made ſuch by ſome Statute ſince 1 *Mar.* and therefore I ſhall conſider,

1. Such Offences as are High Treaſon within the ſaid Statute of 25 *Ed.* 3. or other Statutes grounded thereon, and explaining the ſame.

2. Such as are made High Treaſon by ſubſequent Statutes. See 1 H. H. P. C. 87, 88, &c.

And firſt, by the ſaid Statute of 25 *Ed.* 3. there are four Kinds of High Treaſon.

1. That which immediately concerns the King, his Wife, or Children.

2. That which concerns his Office in the Adminiſtration of Juſtice.

3. That which concerns his Seal.

4. That which concerns his Coin: And theſe three laſt are called Interpretative Treaſons. H. P. C. 7.

Sect. 3. That of the firſt Kind is thus declared by the following Words of the ſaid Statute of 25 *Ed.* 3. *Whereas divers Opinions have been before this Time, in what Caſe Treaſon ſhall be ſaid, and in what not, the King at the Requeſt of the Lords and of the Commons, hath made a Declaration in the Manner as hereafter followeth; that is to ſay: When a Man doth compaſs or imagine the Death of our Lord the King, or of my Lady his Queen, or of their eldeſt Son and Heir: Or if a Man do violate the King's Companion, or the King's eldeſt Daughter unmarried, or the Wife of the King's eldeſt Son and Heir: Or if a Man do levy War againſt our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving them Aid and Comfort in the Realm or elſewhere, and thereof he provably attainted of open Deed by the People of their Condition.*

For the Explication of which I ſhall conſider,

1. The Branch relating to the King and his Relations.

2. That concerning the levying of War, and adhering to the King's Enemies, *&c.*

3. That concerning an Overt Act.

As to the Branch relating to the King and his Relations, I ſhall conſider the following Particulars:

1. Who may be guilty.

2. What is the Import of the Words, *Compaſs or imagine the King's Death.*

3. Who is a King within the Act.
4. What is the Extent of the Clauſe concerning the King's Relations.

Sect. 4. As to the firſt Point, *viz.* who may be guilty,

1. I ſhall take it for granted at this Day, That all Subjects of the Age of Diſcretion, and of [a] Sane Memory, whether they be [b] Eccleſiaſtical or Temporal, Men or Women, are included within thoſe general Words *When a Man doth compaſs*, &c.

Sect. 5. II. Alſo it ſeems clear, That the Subjects of a foreign Prince coming into *England* and living under the Protection of our King, may, in reſpect of that local Ligeance which they owe to him, be guilty of High Treaſon, and indicted that they *contra Dominum Regem*, (the Words *naturalem Dominum ſuum* being omitted) did compaſs, *&c. contra Ligeantiæ ſuæ Debitum.* And it is ſaid, That even an Ambaſſadour committing a Treaſon againſt the King's Life, may be condemned and executed here, and that for other Treaſons he ſhall be ſent home. And it hath been holden, That there is no Need of the Words *contra ligeantiæ ſuæ debitum* in an Indictment for a Treaſon, which is made ſuch by Statute, and is not a Treaſon in its own Nature. And that there is no Neceſſity for the Words *contra ligeum ſupremum Dominum ſuum* in any Indictment of Treaſon.

Sect. 6. [c] But it ſeemeth that Aliens who in an hoſtile Manner invade the Kingdom, whether their King were at War or Peace with ours, and whether they come by themſelves or in Company with *Engliſh* Traitors cannot be puniſhed as Traitors, but ſhall be dealt with by Martial Law. [7]

Sect. 7. [d] It hath been reſolved, That one born a natural Subject is bound to ſuch an inſeparable Allegiance to our King, that howſoever he may endeavour to renounce it, and transfer his Subjection from his natural to a foreign Prince, yet if he practiſe what in any other Subject would amount to High Treaſon he ſhall ſuffer as a Traitor.

Sect. 8. As to the ſecond Point, *viz.* the Import of the Words *Compaſs or imagine the King's Death*, ſince the ſaid Statute theſe Words have been ſo ſtrictly followed, that where a King has been actually murdered, yet not the Killing him, but the Compaſſing his Death has in the Indictment been laid as the Treaſon, and the Killing as an Overt Act thereof.

Sect. 9. And ſuch Compaſſing the King's Death may be manifeſted not only by Overt Acts of a direct Conſpiracy to take away his Life, but alſo by ſuch as ſhew ſuch a Deſign, as cannot be executed without the apparent Peril thereof; as by [e] writing Letters to a foreign Prince, inciting him to invade the Realm; or aſſembling Men together in order to [f] impriſon or [g] depoſe the King, or to [h] compel him by Force to yield to certain Demands, or to levy War *againſt* [i] *his Perſon.*

Sect. 10. But it is poſſible that it may not be proved by an [k] Act, which directly cauſes the King's Death; as the Glancing of an Arrow did that of *William Rufus*, proving fatal merely through an unfortunate Accident, and being accompanied with no unlawful Circumſtance.

Sect. 11. As to the third Point, *viz.* Who is a King within this Act, It ſeems agreed, That [l] every King for the Time being, in actual Poſſeſſion of the Crown, is a King within the Meaning of this Statute: For there is a Neceſſity that the Realm ſhould have a King, by whom and in whoſe Name the Laws ſhall be adminiſtred; and the King in Poſſeſſion being the only Perſon, who either doth or can adminiſter thoſe Laws, muſt be the only Perſon, who has a Right to that Obedience, which is due to him who adminiſters thoſe Laws; and ſince by Vertue thereof he ſecures to Us the Safety of our Lives, Liberties and Properties, and all other Advantages of Government, he may juſtly claim Returns of Duty, Allegiance and Subjection.

Sect.

[a] See Chap. 1.
[b] See Kellw. 181, 182, &c. 3 Inſt. 4. Calvin's Caſe 6. Dy. 145. Pl. 62. Bro. Trea. 31. 3 Inſt. 4, 5, 10. H.P.C. 10, 15. 1 H. H. P. C. 96 to 100, 117. Hob. 271. Sal. 630, 631, 633. 1 Ro. Re. 185. Carthew 319. Sal. 630, 631. Skin. 338, 360, 425, 442.
[c] Bro. Treaſ. 1, 32. H.P.C. 10, 15. Calvin's Caſe 6. b. 3 Inſt. 11. Con. Daliſ. 32.
[d] Dy. 300. Pl. 38. Co. Lit. 129. a. 1 H. H. P. C. 96. Kelynge 8. In the Caſe of the Regicides.
See 1 H. H. P. C. 107, 108.
See 1 H. H. P. C. 108 to 111; 119 to 123.
[e] Dy. 238. Pl. 29. H. P. C. 11. 3 Inſt. 14. 1 H. H. P. C. 120, 122.
[f] 3 Inſt. 6, 12. 38. H. P. C. 11.
[g] Kely. 20, 12. H. P. C. 11. Yet this was made a Query in Bro. Treaſ. 24.
[h] Kelynge 21. Moor 621.
[i] Kelynge 14, 15, 17, 20, 21.
[k] 3 Inſt. 6. 1 H. H. P. C. 107.
[l] H. P. C. 12. 3 Inſt. 7. 9 Ed. 4. 1. b. 1 H. H. P. C. 101, 102, &c.

1 H. H. P. C. 60, 61, 102, 103.
9 Ed. 4. 1. b. Bro. Treaſ. 10, 32.
3 Inſt. 7. H. P. C. 12. Dal. ca. 89. f. 223.

Sect. 12. And this plainly appears even by the prevailing Opinions in the Time of King *Edward* the Fourth, in whoſe Reign the Diſtinction between a King *de Jure* and *de Facto* ſeems firſt to have begun; and yet it was then laid down as a Principle, and taken for granted in the Arguments of *Bagot*'s Caſe, That a Treaſon againſt *Henry* the Sixth, while he was King, in compaſſing his Death, was puniſhable after *Edward* the Fourth came to the Crown, from which it follows, that Allegiance was allowed to have been due to *Henry* the Sixth while he was King, becauſe every Indictment of Treaſon muſt lay the Offence, *contra Ligeantiæ Debitum.*

9 Ed. 4. 1. b. 2. a. Bro. Judg. 42. Charter of Pardon 22. Patents 21. Denizen 3. Exempt. 4. Judgment 42. Fitz-H. Aſſize 29. Denizen 1.

Sect. 13. It was alſo ſettled, That all judicial Acts done by *Henry* the Sixth while he was King, and alſo all Pardons of Felony and Charters of Denization granted by him, were valid; but that a Pardon made by *Edward* the Fourth, before he was actually King, was void, even after he came to the Crown.

9 Ed. 4. 1, 2, 11. 9 Ed. 4. 2. a.

Sect. 14. And by the 11 *H.* 7. Chap. 1. it is declared, *That all Subjects are bound by their Allegiance to ſerve their Prince and Sovereign Lord for the Time being, in his Wars, for the Defence of him and his Land, againſt every Rebellion Power and Might reared againſt him,* &c. *and that it is againſt all Laws, Reaſon and good Conſcience, that they ſhould loſe or forfeit any Thing for ſo doing:* And it is enacted, *That from thenceforth no Perſons that attend on the King for the Time being, and do him true and faithful Allegiance in his Wars within the Realm or without, ſhall for the ſaid Deed and true Duty of Allegiance be convict of any Offence.*

Sect. 15. From hence it clearly follows:

I. That every King for the Time being has a Right to the People's Allegiance, becauſe they are bound thereby to defend him in his Wars againſt every Power whatſoever.

Sect. 16. II. That one out of Poſſeſſion is ſo far from having any Right to our Allegiance by Vertue of any other Title, which he may ſet up againſt the King in Being, that we are bound by the Duty of our Allegiance to reſiſt him.

Kel. 14.

Sect. 17. It is true indeed, that after the Reſtoration of King *Charles* the Second, it was reſolved, That all thoſe who acted againſt, and kept him out of Poſſeſſion, in Obedience to the Powers then in Being, were Traitors.

Kel. 14, 15. 1 Keb. 315. 1 Keb. 454.

Sect. 18. But it ought to be conſidered, that it was firſt reſolved by the ſame Judges, That King *Charles* the Second was King *de Facto* as well as *de Jure*, from his Father's Death; and it is apparent, that no other Perſon was in Poſſeſſion of any Sovereign Power known to our Laws.

3 Inſt. 7. H. P. C. 12. 1 H. H. P. C. 102.

Sect. 19. However, it is a general unconteſted Rule, That upon the Death of a King in actual Poſſeſſion of the Crown, his Heir is a King within the Act before his Coronation; for without a King to execute the Laws, Juſtice muſt fail; and therefore it is a Maxim, That the King never dies.

1 H. H. P. C. 102, 106. 1 Ma. Seſſ. 3. Ch. 1. H. P. C. 12. 3 Inſt. 8.

Sect. 20. A titular King, as the Husband of a Queen Regnant, ſeems to be within the Words, yet it is clearly not within the Meaning of this Law; and *è converſo*, a Queen Regnant is not within the ſtrict Words, and yet ſhe is undoubtedly within the Meaning; for by the Words, *Cur Lord the King*, is meant any Perſon inveſted with the Regal Power.

Sect. 21. By 1 *Will. & Mar.* Seſſ. 2. Chap. 2. Par. 9. *Every Perſon that ſhall be reconciled to, or hold Communion with, the Church of* Rome, *or profeſs the Popiſh Religion, or marry a Papiſt, ſhall be excluded, and be for ever un-*

uncapable to inherit, poſſeſs, or enjoy the Crown of this Realm, &c. *And in every ſuch Caſe the People of this Realm are abſolved from their Allegiance*, &c.

Sect. 22. As to the fourth Point, *viz.* The Extent of the Clauſe concerning the King's Relations, it is to be obſerved,

1. That no Queen or Princeſs Dowager is any Way within the Purview of it. [8]

1 H. H. P. C. 124. 3 Inſt. 8, 9. H. P. C. 12.

2. That if the Companion, (by which Word is meant the Wife) of the King or Prince, conſent to an Adulterer; ſhe is no leſs guilty of High Treaſon than he.

1 H. H. P. C. 128. 3 Inſt. 8, 9. H. P. C. 12.

3. That under the Words; *Their eldeſt Son and Heir*, the Son of a Queen Regnant is included; and alſo the ſecond Son after the Death of the firſt, and perhaps alſo a collateral Heir apparent; eſpecially if he be declared ſuch by Parliament. [9]

3 Inſt. 8, 9. H. P. C. 12. 1 H. H. P. C. 125.

And now we are come to the ſecond general Branch of this Kind of High Treaſon, *viz.* That concerning the levying of War, &c. and adhering to the King's Enemies, &c. in treating whereof I ſhall conſider.

1. What Acts ſhall be ſaid to amount to a levying of War againſt the King.

2. What ſhall be ſaid to be an Adherence to the King's Enemies.

See 1 H. H. P. C. 130, 131, &c.

Sect. 23. As to the firſt Point, it is to be obſerved, That not only thoſe who directly rebel againſt the King, and take up Arms in order to dethrone him, but alſo in many other Caſes, thoſe who in a violent and forcible Manner withſtand his lawful Authority, or endeavour to reform his Government, are ſaid to levy War againſt him; and therefore,

Sect. 24. Thoſe that hold a Fort or Caſtle againſt the King's Forces, or keep together armed Numbers of Men againſt the King's expreſs Command have been adjudged to levy War againſt him. But thoſe who join themſelves to Rebels, &c. for fear of Death, and retire as ſoon as they dare, ſeem to be no way guilty of this Offence.

3 Inſt. 10. H. P. C. 14. Bro. Treaſ. 24. Dal. ch. 89. fo. 224. 1 H. H. P. C. 139.

Sect. 25. II. Thoſe alſo who make an Inſurrection in order to redreſs a publick Grievance, whether it be a real or pretended one, and of their own Authority attempt with Force to redreſs it, are ſaid to levy War againſt the King, altho' they have no direct Deſign againſt his Perſon, inaſmuch as they inſolently invade his Prerogative, by attempting to do that by private Authority, which he by publick Juſtice ought to do, which manifeſtly tends to a downright Rebellion; as where great Numbers by Force attempt to remove certain Perſons from the King; or to lay violent Hands on a Privy Counſellor; or to revenge themſelves againſt a Magiſtrate for executing his Office; or to bring down the Price of Victuals; or to reform the Law or Religion; or to pull down all Bawdy-houſes; or to remove all Incloſures in general, &c. But where a Number of Men riſe to remove a Grievance to their private Intereſt, as to pull down a Particular Incloſure intrenching upon their Common, &c. they are only Rioters. [10]

Moor 621. H. P. C. 14. 3 Inſt. 9, 10. 2 And. 5. Kelynge 75, &c. 1 H. H. P. C. 131, 135, 152, 153. Moor 621. Cro. Car. 583. Poph. 122, 123. 2 And. 4, 5. 3 Inſt. 9. 1 Ven. 250, 251. H. P. C. 14. Kelynge 76.

Sect. 26. In a ſpecial Verdict, not only thoſe who are expreſly found to have been aiding and aſſiſting a rebellious Inſurrection, but perhaps alſo thoſe who are only found to have acted in the Execution of the intended Violence, or to have attended the principal Offender from the Beginning, though they be not found to have known the Deſign of the Riſing, ſhall be adjudged guilty of High Treaſon; but thoſe who are found only to have ſuddenly joined with them in the Streets, and to have flung up their Hats and hallowed with them, are guilty of no greater Offence than a Riot at moſt.

1 H. H. P. C. 136. 1 Sid. 358. 3 And. 66. Pop. 121. 3 Inſt. 9. H. P. C. 14. Kelynge 75. 1 H. H. P. C. 138. Moor 621, 622.

Sect. 27. However it is certain, That a bare Conſpiracy to levy ſuch a War cannot amount to Treaſon, unleſs it be actually levied; yet it hath been reſolved, that a Conſpiracy to levy War againſt the King's Perſon may be alledged as an Overt Act of compaſſing his Death, and that in all Caſes, if the Treaſon be actually compleated, the Conſpirators, *&c.* are Traitors as much as the Actors: And [a] that there may be a Levying of War, where there is no actual Fighting. [11] [12]

Sect. 28. As to the ſecond Point, (*viz.*) What ſhall be ſaid to be an Adherence to the King's Enemies, *&c.* this is explained by the Words ſubſequent, *Giving Aid and Comfort to them*; from which it appears, that any Aſſiſtance given to Aliens in open Hoſtility againſt the King, as by ſurrendring a Caſtle of the King's to them for Reward, or ſelling them Arms, *&c.* or aſſiſting [b] the King's Enemies againſt his Allies; or cruiſing in a Ship with Enemies, to the Intent to deſtroy the King's Subjects, is clearly within this Branch; but there is no Neceſſity, expreſly to alledge, that ſuch Adherence [c] was againſt the King, for it is apparent; yet the ſpecial Manner of Adherence muſt be ſet forth: And it is ſaid, that the Succouring a Rebel fled into another Realm is not within the Statute, becauſe a Rebel is not properly an Enemy, and the Statute is taken ſtrictly.

Sect. 29. As to the Branch relating to an Overt Act, I ſhall take it for granted, that ſome Overt Act muſt be alledged in every Indictment of High Treaſon, in compaſſing the Death of the King, *&c.* or levying War, or adhering to the King's Enemies; but there hath been ſome Queſtion concerning what ſhall be ſaid to be ſuch an Overt Act, as to which I ſhall conſider,

1. What Facts amount to ſuch and Overt Act.
2. Whether any Words be ſufficient.

Sect. 30. As to the firſt Point it ſeems clearly agreed by all, That conſpiring the King's Death, and providing Weapons to effect it, or ſending Letters to incite others to procure it, or actually aſſembling People in order to take the King into their Power, and all other ſuch like notorious Facts, done in Purſuance of a treaſonable Purpoſe againſt the King's Perſon, may be alledged as Overt Acts to prove the Compaſſing his Death.

Sect. 31. It has alſo been adjudged, That the [d] levying War againſt the King's Perſon; or the bare [e] conſulting to levy ſuch War; or meeting together and [f] conſulting the Means to deſtroy the King and his Government; or [g] aſſembling with others, and procuring them to attempt the King's Death; or liſting [h] Men in Order to depoſe the King; or [i] printing treaſonable Poſitions, as that the King is accountable to the People, and that they ought to take the Government into their own Hands, *&c.* or publiſhing a Book to prove that [k] the King's Government is Antichriſtian and Heretical, *&c.* may be alledged as Overt Acts to prove the Compaſſing the King's Death.

Sect. 32. As to the ſecond Point, *viz.* Whether any Words are ſufficient Overt Acts? it has been holden, That [l] written Words in a Sermon or other Writing may amount to Overt Acts of compaſſing the King's Death, tho' the ſame neither actually were, nor ever were intended to be, preached or publiſhed; but this Opinion ſeems [m] to be over ſevere, for though it be true, that *ſcribere eſt agere*, yet ſurely it cannot with any Propriety be ſaid, that to write in ſuch a private Manner *eſt apertè agere*, and it ſeems rigorous to make that amount to a malicious Deſign againſt the King, which perhaps was only done by Way of Amuſement or Diverſion.

1 H. H. P. C. 131, 151. Daliſ. 14, 15. St. Tr. Vol. 4. f. 63, 97. H.P.C. 13, 14. Dy. 98. Pl. 56. Kelynge 19, 20. Infra Sect. 31. Hetl. 65. 3 Inſt. 9.

[a] Sal. 635. 3 Inſt. 11. 1 H. H. P. C. 165 to 169. 3 Inſt. 10. H. P. C. 14. Daliſ. 89, 224. H. P. C. 115. Vide 2 Ven. 315, 316.

[b] Salk. 634, 635. See Vaughan's Trial in the St. Tr. Vol. 4. f. 347, 348, &c.

[c] St. Tr. V. 4. f. 347, 348. 3 Inſt. 12, 13. Sal. 635. 1 H. H. P. C. 108. H. P. C. 13. 3 Inſt. 13, 14. Bro. Treaſon 24.

1 H. H. P. C. 108, 109, 110.

[d] Kelynge 14, 17.

[e] Kelynge 20, 21. St. Tr. Vol. 3. f. 149 to 158, 228. Vol. 4. f. 63, 79, 207, 277, 278, 282. Vol. 3. f. 179. Ruſhw. Straffford's Trial 684.

[f] Kelynge 15. St. Tr. Vol. 3. fol. 126.

[g] 1 And. 106.

[h] 2 Vent. 316.

[i] Kelynge 22. St. Tr. Vol. 1. fol. 977. Vol. 3. f. 228. Supra Sect. 24.

[k] 2 Rol. Rep. 89, 90.

[l] 2 Ro. Re. 89.

[m] Cro. Ca. 125. 2 Ro. Re. 89. See the Reverſal of the Attainder of Algernoon Sidney, 1 W. & M. St. c. 7. private Acts.

Sect. 33. But the great Queſtion is, Whether Words only ſpoken can amount to an Overt Act of compaſſing the King's Death? Which having been queſtioned by ſome great Men, and denied by others, I dare not be peremptory concerning it. S. P. C. 2. Kelynge 13. 3 Inſt. 14, 140. H. P. C. 13.

Sect. 34. However it ſeems agreed, That Words ſpoken only in Contempt and Diſgrace of the King, and not directly ſhewing any Purpoſe to rebel, or any Way to hurt his Perſon, or diſturb his Government, as thoſe which charge him with a perſonal Vice, as Drunkenneſs, *&c.* or a perſonal Defect, as Want of Wiſdom, or Steddineſs, *&c.* ſhall not be ſo far ſtrained, as to be made Overt Acts of compaſſing his Death, *&c.* Cro. Ca. 125. Cro. Ca. 117, 125.

Sect. 35. Indeed it has been holden, That to affirm that another has a better Title than the King, is High Treaſon, becauſe it tends to draw People from their Allegiance, and to create a Mutiny, *&c.* but perhaps this may be queſtioned, becauſe it cannot certainly appear from ſuch Words, whether the Speaker had a Deſign againſt the King's Perſon or no? However there can be no Doubt, but that ſuch Diſcourſes are highly puniſhable, as great Miſdemeanors, and tending to raiſe Doubts, and diſturb the Government. Yelv. 107. 2 Ro. Re. 90. Palm. 426.

Sect. 36. Alſo the following Words have been adjudged High Treaſon, If King *Henry* the Eighth will not take back his Wife, he ſhall not be King, but ſhall die;——If the King will arreſt me for High Treaſon I will ſtab him;——If I knew that *Perkin Warbeck* was the Son of *Edward* the Fourth, I would take his Part againſt *Henry* the Seventh. 1 Ro. Re. 185. 14 H. 8. 12. a. [a] Salk. 631. 2 Ven. 315. St. Tr. Vol. 4. fol. 30, 31, 95, 172.

Sect. 37. But however the Laws may ſtand in Relation to ſuch conditional Words, or to looſe [a] Words ſpoken without Relation to any Act, yet it ſeems clear that Words joined to an Act may explain it, and that Words of Perſuaſion to kill the King, or manifeſting an Agreement, or Conſultation, or Directions to that Purpoſe, are ſufficient Overt Acts of Compaſſing his Death; and it hath been ſtrongly holden, that any [b] deliberate Words, which ſhew a direct Purpoſe againſt the King's Life, as theſe, If I meet the King I will kill him, being ſpoken maturely and adviſedly, are ſufficient Overt Acts of compaſſing or imagining his Death. 1 H. H. P. C. 115, 116. [b] 1 Ro. Re. 185. Cro. Ca. 117, 118, 125, 332, 333. 1 Lev. 57. Kelynge 13. St. Tr. Vol. 2. f. 133, 135. Vol. 3. fol. 295, 1001.

Sect. 38. [c] And ſince the Compaſſing or Imagining of the King's Death is the Treaſon, and Words be the moſt natural Means of expreſſing the Imagination of the Heart, why ſhould they not be good Evidences of it? Beſides it has been often adjudged, That falſely to charge a Man with ſpeaking Treaſon is actionable, which could not be, if no Words could amount to Treaſon, as in the Arguments of thoſe Caſes it is clearly holden that they may, and not ſo much as made a Queſtion. 1 Keb. 14. 34, 179, 231. Dalt. Ch. 89. fo. 223, 224. 3 Mod. 53. See the Precedent cited Cro. Ca. 118.

Sect. 39. Beſides it is certain, That before the 25 *Ed.* 3. Words might amount to Treaſon; and it is a general Rule, That in doubtful Caſes the Reaſon of the Common Law ought to govern the Conſtruction of a Statute. Alſo [d] there can be no Doubt but that he, who by Command or Perſuaſion induces another to commit Treaſon, is himſelf a Traitor; (for without Queſtion by ſuch Means he would be acceſſary to a Felony; and it is an uncontroverted Rule, That [e] whatever will make a Man an Acceſſary in Felony, will make him a Principal in Treaſon) and yet he does no Act but by Words. [c] Yelv. 107, 197. Cro. Ja. 276. 406, 413. Hutt. 75. Winch 124. 1 Bulſt. 148. 3 Bulſ. 225. 1 Ro. Re. 444. [d] S. P. C. 2. b. [e] H. P. C. 215.

Sect. 40. As to Sir *Edward Coke*'s Argument from 3 *H.* 7. 14. which makes the [f] Compaſſing the King's Death, or that of any of his Council, *&c.* by the King's Servants, Felony; from whence he infers, that in the Judgment of this Parliament, the Compaſſing the King's Death by bare Words could not be Treaſon before; it may be anſwered, That this Argument extends as well to the King's Servants Compaſſing his Death by any other [f] 3 Inſt. 38.

Act

Act whatever, as to their doing it by bare Words; for all are equally within the 3 *H.* 7. and yet none will contend, but that the former hath always been Treaſon.

H. P. C. 13. 1 H. H. P. C. 111, 112.

Sect. 41. As to the Argument, that Compaſſing the King's Death by bare Words cannot amount to Treaſon, within 25 *Ed.* 3. becauſe many late temporary Acts of Parliament have made it Treaſon, which would be needleſs if it were ſo before; it may be anſwered, That the principal End of thoſe Statutes was to make it Treaſon to charge the King with Hereſy or Schiſm, or Uſurpation, or to affirm that it was lawful to take up Arms againſt him, which the *Romaniſts* were apt to be guilty of at the Beginning of the Reformation, and it may be queſtioned whether theſe be Overt Acts of High Treaſon within 25 *E.* 3.

Vide 2 Ro. Rep. 89, 90.

Sect. 42. Indeed it is recited in the Preamble of 1 *Mar.* Seſſ. 1. Chap. 1. *That the State of every King conſiſts more aſſuredly in the Love of the Subject towards their Prince, than in the Dread of Laws made with rigorous Pains; and that Laws made for the Preſervation of the Commonwealth without great Penalties are more often obeyed and kept, than Laws made with extream Puniſhments. And in ſpecial ſuch Laws ſo made, whereby not the Ignorant but alſo the Learned, minding Honeſty, are often trapped, yea many Times for Words only, without other Fact or Deed done or perpetrated; and thereupon the Queen calls to remembrance, that many, as well honourable Perſons, as others of good Reputation, had then of late, (for Words only, without other Opinion, Fact, or Deed,) ſuffered ſhameful Death, and expreſſes her Pleaſure, that the Severity of ſuch like extream dangerous and painful Laws ſhall be aboliſhed.* And then follows the enacting Clauſe, *That from thenceforth none Act or Offence, being by Act of Parliament or Statute made Treaſon, Petit Treaſon, or Miſpriſion of Treaſon, by Words, Writing, Cyphering, Deeds, or otherwiſe whatſoever, ſhall be taken, had, deemed, or adjudged to be High Treaſon, Petit Treaſon, or Miſpriſion of Treaſon, but only ſuch as be declared and expreſſed to be Treaſon, Petit Treaſon, or Miſpriſion of Treaſon, by* 25 Ed. 3. *Nor that any Pains of Death, Penalty or Forfeiture, in any Ways enſue to any Offender for the doing any Treaſon,* &c. *other than ſuch as by the ſaid Statute of* 25 Ed. 3. *be ordained; any Statute ſince the ſaid twenty-fifth Year of* Ed. 3. *or other Declaration to the contrary in any wiſe notwithſtanding.*

Sect. 43. And it muſt be confeſſed, That this Statute *primâ Facie* ſeems very much to favour the Opinion, That no Words whatſoever can of themſelves amount to Overt Acts of High Treaſon, inaſmuch as one of the principal Miſchiefs intended to be redreſſed by it ſeems to be, that Men had often ſuffered as Traitors for Words only; yet the Force of this Objection will be very much leſſened, if we conſider, that the principal Purport of the ſaid Statute of 1 *Mar.* ſeems to be, to make the 25 *Ed.* 3. according to the Intention of the Makers of it, the only Standard of Treaſon, and to aboliſh all ſubſequent Statutes, which had made any Offences Treaſon, which were not contained in the ſaid Statute of 25 *Ed.* 3. but no Way to extenuate the Crimes mentioned in 25 *Ed.* 3. or to take away the Force of any natural Expoſition thereof; for the firſt Part of the Preamble complains of ſuch Laws as not only inflicted Puniſhments over ſevere for the Crimes intended to be reſtrained by them, but were alſo penned in ſuch a Manner, as to be often apt to entrap the wiſeſt by bare Words; but ſurely this can no Way be applicable to 25 *Ed.* 3. inaſmuch as no Puniſhments can be thought extream for the Crimes therein reſtrained, and there can be no Danger from that Statute of any Man's being puniſhed for unwary or innocent Words, inaſmuch as there is no Colour to ſay, that any Words, as ſuch, are puniſhed within that Statute,

but only the moſt wicked Imagination of the Heart, which may be ſometimes proved by the Evidence of Words: And it farther appears from the next Part of the Preamble of the ſaid Statute of 1 *Mar.* that it has an Eye only to ſuch Statutes as are above mentioned, inaſmuch as it complains of Perſons having ſuffered ſhameful Deaths for Words only, without other Opinion, Fact, or Deed, which is very applicable to thoſe many Statutes in the Time of *H.* 8. as 26 *H.* 8. 13. and 35 *H.* 8. 3. and ſome others, which made bare Words High Treaſon, many of which were ſo far from purporting a Deſign againſt the King's Life, that they were ſcarce otherwiſe Criminal, than as they were prohibited by thoſe Statutes; but ſurely this can have no Relation to 25 *Ed.* 3. either in puniſhing a Man for ſuch Imaginations of the Heart as are moſt perverſly wicked, or in ſuffering thoſe Imaginations to be proved upon him from his own Mouth. Alſo it is farther remarkable, That the enacting Clauſe reſtrains only ſuch Offences, as are made High Treaſon by Statutes ſubſequent to 25 *Ed.* 3. from being adjudged High Treaſon by Words, Writing, Cyphering, *&c.* and ſeems to leave the Offences contained in the ſaid Statute to the ſame Conſtruction which they had before.

Sect. 44. As to the Authority of Sir *Edw. Coke* in his third Inſtitute it is of the leſs Weight, becauſe he is ſaid to have been ſome Time of the contrary Opinion. — 3 Inſt. 14, 140. 1 Rol. Re. 186.

Sect. 45. Neither does it appear to me, That my Lord Chief Juſtice *Hale* was at all of this Opinion; for though in the latter Edition of his *Treatiſe of the Pleas of the Crown*, it be ſaid, That compaſſing by bare Words is not an Overt-Act, *&c.* yet in the firſt Edition publiſhed in the Year 1678. it is twice ſaid, That it hath been adjudged that Words are an Overt Act. [13.] — Old Edition 13, 16.

Sect. 46. The ſecond Kind of High Treaſon concerning the King's Office in the Adminiſtration of Juſtice is expreſſed in the Words following: *If a Man ſlay the Chancellor, Treaſurer, or the King's Juſtices of the one Bench or the other, Juſtices in Eyre, or Juſtices of Aſſize, and all other Juſtices aſſigned to hear and determine, being in their Places during their Offices.* — 1 H. H. P. C. 111 to 120, 312, 322, 323.

Sect. 47. It hath been holden, That this Part of the Statute ſhall not be extended by Equity, to any other high Officers of State beſides theſe expreſly named, nor even to theſe when they are not in actual Execution of their Offices, nor to any Attempt to kill them, nor even to the actual wounding of them, unleſs Death enſue. *See the next Chapter.* — H. P. C. 17. 3 Inſt. 18, 38. 1 H. H. P. C. 230 to 232.

Sect. 48. The third Kind of High Treaſon, relating to the King's Seal, is ſaid to have been High Treaſon at the Common Law, and is expreſſed in the following Words, *And if a Man counterfeit the King's Great or Privy Seal.* — 3 Inſt. 15. S. P. C. 2, 3. 1 H. H. P. C. 181 to 184.

Sect. 49. It hath been holden, That theſe Words extend to the Aiders and Conſenters to ſuch Counterfeiting, as well as to the Actors. — H. P. C. 18. S. P. C. 3. a.

Sect. 50. But not to an Intent or Compaſſing to do it, if it be not actually done. — 3 Inſt. 15. H. P. C. 18.

Sect. 51. [a] Nor to the fixing of the Great Seal to a Patent without a Warrant for ſo doing. — 1 H. H. P. C. 181. [a] 3 Inſt. 15. H. P. C. 18.

Sect. 52. [b] Nor to the razing of the Name of one Manor out of a Patent, and putting in that of another, nor to any artificial removing of the true Writing, and adding Matter altogether new: Nor, by the better Opinion, to the taking off the Wax impreſſed with the Great Seal from a true Patent, and fixing it to a Writing purporting a Grant from the King. — Con. Dal. c. 89. f. 225. See 1 H. H. P. C. 181, 182. [b] Kelynge 80. 3 Inſt. 15.

Sect. 53. [c] Nor to the Counterfeiting of the Sign Manual, or Privy Signet, but this is made High Treaſon by 1 *Mar.* 6. — 12 Co. 15, 16, 17. 3 Inſt. 15, 16.

Sect. 54. The fourth Kind of High Treaſon concerning the Coin is expreſſed in theſe Words, *If a Man counterfeits the King's Money, and if a* — 2 Keb. 74. Bro. Treaſ. 3, 17, 48. 40 Aſſ. 32. 2 H. 4. 25.

[c] 1 Rol. Rep. 50, 51. H. P. C. 8. Con. S. P. C. 3. Letter B.

Man bring falſe Money into this Realm, counterfeit to the Money of England, *as the Money called* Luſhburgh, *or other like to the ſaid Money of* England, *knowing the Money to be falſe, to merchandize or make Payment, in Deceit of our ſaid Lord the King and his People.*

In treating hereof I ſhall conſider,

1. The Branch relating to the counterfeiting of the King's Money.
2. That concerning the bringing of falſe Money into the Realm, *&c.*

In treating of the firſt Branch I ſhall ſhew,

1. What Degree of counterfeiting Money will amount to High Treaſon.
2. What ſhall be ſaid to be the King's Money within this Act.

1 H. H. P. C. 213, 214, 229. Bro. Treaſ. 27. H. P. C. 20. 3 Inſt. 16. Contra 6 H. 7. 13.

Sect. 55. As to the Point of counterfeiting, it is ſaid, That thoſe, who coin Money without the King's Authority, are guilty of High Treaſon within this Act, whether they utter it or not; and that thoſe, who have the King's Authority to coin Money, are guilty of High Treaſon, if they make it of baſer Alloy than they ought; and that thoſe alſo are guilty of the ſame Crime, who receive and comfort one who is known by them to be guilty thereof; but that Clippers, *&c.* are not within this Statute.

3 H. 7. 10. 2 Inſt. 375. 3 Inſt. 17. H. P. C. 127. Kelynge 33. Contra Dyer 296. and 1 H. H. P. C. 233. H. P. C. 19.

Sect. 56. [a] But it ſeems, That thoſe, who barely utter falſe Money made within the Realm, knowing it to be falſe, are neither guilty of High Treaſon, nor of a Miſpriſion thereof, but only of a high Miſpriſion: Yet by 8 & 9 *Will.* 3. 26. they are in ſome Caſes made guilty of Felony, for which ſee the next Chapter.

[a] 3 H. 7. 10. b. H. P. C. 128. Bro. Treaſ. 19. 1 H. H. P. C. 214, 373, 375.

Sect. 57. [b] As to the ſecond Point, *viz.* What ſhall be ſaid to be the King's Money? It ſeems, That ſuch only as is coined by the King's Authority either in Gold or Silver within the Realm, and conſequently not braſs Farthings, *&c.* ſhall come under this Denomination. [14.]

[b] 3 Inſt. 577. 3 Inſt. 17. 2 Keb. 36. Dalt. ca. 89. 1 H. H. P. C. 210 to 213.

Sect. 58. But the Miſchiefs intended to be remedied by this Statute, having been found by Experience not to have been ſufficiently redreſſed by it, as thus reſtrained, the ſame have been farther provided for by ſubſequent Statutes.

Sect. 59. For by 1 *M.* Seſſ. 2. *Ca.* 6. *Thoſe who forge any Foreign Coin of Gold or Silver, which ſhall be current by Conſent of the King, ſhall be guilty of High Treaſon.*

Sect. 60. And by 14 *El.* 3. *Thoſe who forge Money not current,* &c. *their Aiders and Abetters are guilty of Miſpriſion of Treaſon.*

1 H. H. P. C. 327, 328.

Sect. 61. By 5 *El.* 11. *Whoever ſhall waſh, clip, round or file,* And by 18 *El.* 1. *Whoever ſhall impair, diminiſh, falſify, ſcale or lighten, for Lucre or Gain, the proper Money of this Realm, or that of other Realms made current by Proclamation, ſhall be deemed as an Offender in Treaſon, and forfeit all his Chattels abſolutely, and his Hereditaments for Life, but without Corruption of Blood or Loſs of Dower.*

Sect. 62. By 8 & 9 *W.* 3. 25. made perpetual by 7 *Annæ* 25. *Whoever ſhall knowingly make or mend, or begin to make or mend, buy, ſell, or have in his Poſſeſſion any Mould or Preſs for coining; or convey ſuch Inſtruments out of the King's Mint, or mark on the Edges any Coin current, or counterfeit or colour or gild any Coin reſembling the current Coin of this Kingdom, or any round Blanks of baſe Metal,* &c. *ſhall be guilty of High Treaſon, but without Corruption of Blood or Loſs of Dower*; And by 7 *Annæ* 25. *The Proſecution for ſuch making,* &c. *may be at any Time within ſix Months.*

Sect. 63. And by Par. 5. *Such Inſtruments may be ſeiſed by any Perſon, and brought before a Juſtice of Peace, in order to be produced in Evidence at the Trial of ſuch Offenders; and after they ſhall be ſo produced, they ſhall be defaced and deſtroyed; and all falſe Money, which ſhall be ſo produced, ſhall be cut in Pieces.*

By 6 G. 2 & 26. Counterfeiting Broad pieces is made High Treason — Sect
By 15 G. 2. c. 28. altering Shillings & Sixpences to make 9ᵗᵉ resemble
-near half Guineas is High Treason — by Sect: 2. uttering false
knowingly &c. 3. offence Felony without clergy. Sect. 3. uttering
money twice within ten days & or having
-pris'ons. 2. offence felony with. clergy. Sect. 6. Counterfeiting
copper money two years Imprisonment

Sect. 64. By 6 & 7 *Will.* 3. 17. *Whoever ſhall apprehend a Coiner or Clipper, &c. and proſecute him to Conviction, ſhall receive of the Sheriff* 40 l. &c. *And, he who being guilty himſelf ſhall diſcover two or three more, ſhall have a Pardon.* B. 2. Ch. 12. Sect. 25.

As to the ſecond Branch concerning the bringing falſe Money into the Realm the following Particulars are obſervable, See 1 H. H. P. C. 225.

Sect. 65. I. That the Money ſo brought muſt be counterfeited according to the Similitude of *Engliſh* Money: But by 1 & 2 *Phil. & Mar.* 11. *It is made High Treaſon to bring into the Realm Money counterfeited according to the Similitude of foreign Coin current here, to the Intent to merchandize therewith.* 1 H. H. P. C. 225, 228, 229, 317. H. P. C. 21. S. P. C. 3.

Sect. 66. II. That it muſt be brought by one, who knows it to be falſe.

Sect. 67. III. That it muſt be brought from a foreign Nation, and not from *Ireland*, or other Place ſubject to the Crown of *England*; for tho' to ſome Purpoſes they be diſtinct from the Realm of *England*, and conſequently Money brought from thence may within the Letter of the Statute be ſaid to be brought into the Realm; yet inaſmuch as the counterfeiting is puniſhable there by the Laws of our King as much as in *England*, the bringing Money from ſuch Places has been conſtrued to be no more within the Act than if they were actually in *England*. 1 H. H. P. C. 225, 226, 317. 3 H. 7. 10. S. P. C. 3. 3 Inſt. 18. H. P. C. 12. Bro. Treaſ. 19. Dal. 89. f. 225.

Sect. 68. IV. That the bare uttering of ſuch Money here by one who brought it not over, is not within this Branch; but by Force of an antient Statute, if falſe Money be found in the Hands of a ſuſpicious Perſon, he may be arreſted till he have found his Warrant. 3 Inſt. 18. H. P. C. 21.

Sect. 69. V. That it is not neceſſary that ſuch falſe Money be actually paid away or merchandized withal, for the Words are to merchandize or make Payment, *&c.* which only import an Intention to do ſo, and are fully ſatisfied whether the Act intended be performed or not: But *Quære*, becauſe both *Coke* and *Hale* ſeem to hold otherwiſe; however it is clear, that bringing over Money counterfeited according to the Similitude of foreign Coin is Treaſon within 1 & 2 *Phil. & Mar.* 11. [15.] 3 Inſt. 18. H. P. C. 21.

Sect. 70. Alſo in the ſaid Statute of 25 *Ed.* 3. there is this Clauſe, *And becauſe that many other like Caſes of Treaſon may happen in Time to come, which a Man cannot think nor declare at this preſent Time, it is accorded, That if any other Caſe, ſuppoſed Treaſon, which is not above ſpecified, doth happen before any Juſtices, the Juſtices ſhall tarry without any going to Judgment of the Treaſon, till the Cauſe be ſhewed and declared before the King and his Parliament, whether it ought to be judged Treaſon or other Felony.*

Sect. 71. By Virtue of this Clauſe, many Offences which are not High Treaſon within this Statute, as the Murder of an Ambaſſador, *&c.* were declared by the Parliament to be High Treaſon, but theſe and all other ſuch like Declarations are made void by 1 *Mar.* 1. And it ſeems that the Parliament have no ſuch Power at this Day by Virtue of the ſaid Clauſe, inaſmuch as the ſaid Statute of 1 *Mar.* expreſly enacts, *That no Offence ſhall be deemed High Treaſon, but only ſuch as is declared and expreſſed to be ſo by* 25 *Ed.* 3. and takes no Notice of the ſaid Clauſe relating to the Parliament. 1 H. H. P. C. 308. 3 Inſt. 8. 12 Co. 16.

And now we are come to Offences, which have been made High Treaſon ſince the ſaid Statute of 1 *Mar.* and in treating of theſe, we ſhall conſider,

1. Offences in upholding or favouring the Power of the Pope.
2. Offences againſt the Proteſtant Succeſſion.
3. Offence of liſting Men without the King's Licence.

And firſt, Offences in upholding, or favouring the Power of the Pope, ſeem reducible to the following Heads:

1. Extolling the Pope's Power.
2. Putting in Ure Popiſh Bulls.
3. Perverting others, or being perverted to Popery.

4. Re-

4. Receiving Popiſh Orders or Education in Popiſh Seminaries, and not ſubmitting, *&c.*

5. Refuſing a ſecond Tender of the Oaths.

Sect. 72. And firſt, The Offence of extolling the Pope's Power is made High Treaſon by 5 *El.* 1. Par. 2. & 10. by which it is enacted, *That if any Perſon within the Queen's Dominions ſhall by Writing, Cyphering, Preaching or Teaching, Deed or Act, adviſedly and wittingly hold or ſtand with, extol or ſet forth, maintain or defend, the Juriſdiction of the Biſhop of* Rome, *heretofore claimed in this Realm, or by any Speech, open Deed or Act, willingly or adviſedly attribute any ſuch Authority to the See of* Rome, *he ſhall be guilty of a* Præmunire *by the firſt Offence, of High Treaſon by the ſecond, but without Corruption of Blood or Loſs of Dower.*

See 1 H. H. P.C. 331, 332.

Dyer 282. *Sect.* 73. It has been holden, That he, who knowing the Effect of a Book written beyond Sea, brings it over and ſecretly ſells it; and alſo, That he who by Report hearing the Contents thereof commends it; and alſo, That he, who knowing its Contents ſecretly conveys it to a Friend with an Intent to pervert him, is in Danger of the Statute; and it has been reſolved, That he, who having read the Book does afterwards in diſcourſing of it, allow it to be good; and alſo, That whoever writes or prints ſuch a Book, and after publiſhes it, is clearly guilty: But it is ſaid, That he, who having heard of the Contents barely buys and reads the Book, is not within the Statute.

Sav. 46. Pl. 99. *Sect.* 74. It has alſo been holden, That if one who is convicted and condemned for an Offence of this Nature, being afterwards demanded by the Judges, Whether he be ſtill of the ſame Opinion? anſwer, That he is, he is guilty of High Treaſon, as having adviſedly maintained the Pope's Power a ſecond Time.

Sect. 75. The ſecond Offence of this Kind, *viz.* That of putting in Ure a Popiſh Bull, is made High Treaſon by 13 *El.* 2. Par. 2 & 3. By which it is enacted, *That if any within the Queen's Dominions ſhall put in Ure, any Bull or Inſtrument of Abſolution or Reconciliation obtained from the See of* Rome; *or ſhall take upon him by Colour thereof to abſolve or reconcile any Perſon; or to grant or promiſe any Abſolution or Reconciliation, or ſhall willingly receive any ſuch Abſolution or Reconciliation, or ſhall obtain from the See of* Rome *any Bull or Writing whatſoever, or publiſh, or any Ways put the ſame in Ure, he is guilty of High Treaſon.* And by Par. 4. *Acceſſaries after the Offence incur a* Præmunire. And by Par. 5, 6. *Thoſe who within ſix Weeks diſcloſe not an Offer of ſuch Bulls,* &c. *to ſome Privy Counſellor,* &c. *are guilty of a Miſpriſion of Treaſon.*

1 H. H. P. C. 337, 338. *Sect.* 76. The third Offence of this Kind, *viz.* That of perverting others, or being perverted to Popery, is made High Treaſon by 23 *El.* 1. Par. 2. & 3 *Jac.* 1. 4. Par. 22, 23. by which it is enacted, *That if any one ſhall pretend to have Power, or ſhall put in Practice to withdraw a Subject from his natural Obedience to the King, or to withdraw them for that Intent to the* Romiſh *Religion, or to move to promiſe any Obedience to any foreign Power, or to do any Overt Act to that Intent, or to reconcile one to the See of* Rome; *and if any Perſon ſhall by any Means be willingly withdrawn, or promiſe Obedience, as aforeſaid, he is guilty of High Treaſon.*

See Cawley 187. *Sect.* 77. But by 3 *Jac.* 1. 4. *If any Perſon, who is reconciled to the See of* Rome *beyond the Seas, return into the Realm and ſubmit himſelf,* &c. *and take the Oaths within ſix Days after his Return, he is excuſed.*

Sect. 78. It ſeemeth that the bare pretending to ſuch a Power, without any farther Act in endeavouring to perſwade Perſons from their Allegiance, or the bare endeavouring ſo to perſwade them, without any Pretence of ſuch a Power, is High Treaſon within theſe Acts.

Savil 31. Pl. 9.

Sect. 79.

Sect. 79. The fourth Offence of this Kind, *viz.* That of receiving Popiſh Orders or Education, *&c.* is made High Treaſon by 27 *El.* 2. Par. 3. by which it is enacted, *That if any Eccleſiaſtick born in the Queen's Dominions, and ordained or profeſſed by Popiſh Authority, ſhall remain in the Queen's Dominions, or come from beyond Sea, and not ſubmit to ſome Biſhop or Juſtice of Peace within three Days, and take the Oaths,* &c. *he ſhall be guilty of High Treaſon.* 1 H. H. P. C. 336, 337.

Sect. 80. And by Par. 5. *If any Subject, not being an Eccleſiaſtick, ſhall not return from a Popiſh Seminary within ſix Months after a Proclamation to that Purpoſe in* London, *and ſubmit,* &c. *within two Days, he ſhall be guilty of High Treaſon, whenever he ſhall otherwiſe return.*

Sect. 81. And by Par. 13. *If any Subject ſhall know that any ſuch Prieſt is within the Realm, and not diſcover him to ſome Juſtice of Peace,* &c. *within twelve Days, he ſhall be fined and impriſoned at the Queen's Will; and if any Juſtice of Peace,* &c. *to whom ſuch Matter ſhall be diſcovered, ſhall not give Information to ſome of the Privy Council,* &c. *within twenty-eight Days, he ſhall forfeit two hundred Marks.*

In the Conſtruction of this Statute it hath been reſolved,

Sect. 82. I. That in an Indictment grounded on this Statute againſt a Prieſt remaining here beyond the Time limited by the Statute, it muſt be alledged, That he was born in the Realm, *&c.* and alſo that he was ordained, *&c.* by Authority challenged or pretended from the See of *Rome*; but that there is no need to ſhew in what Place in particular he was born, or whether he were ordained within the Realm, or beyond Sea. Poph. 94.

Sect. 83. II. That one in Popiſh Orders, being in a Ship in Order to go to *Ireland*, and driven by a Storm into *England*, and immediately apprehended, is not guilty of High Treaſon within this Act; for his Deſign of going to *Ireland* was prevented, *& nil efficit conatus, niſi ſequatur effectus*, and he was forced into *England* by the Act of God, and againſt his Will; neither can he be ſaid to remain here within the Intent of the Statute, becauſe he was compelled to it by Reaſon of the Proſecution. Raym. 377.

Sect. 84. The fifth Offence of this Nature, *viz.* That of refuſing a ſecond Tender of the Oaths, is made High Treaſon by 5 *El.* 1. Par. 11, 12 & 20. by which it is enacted, *That if any Perſon who ſhall have a Charge, Cure, or Office in the Church, or an Office or Miniſtry in an Eccleſiaſtical Court, or if any Perſon who ſhall willfully refuſe to obſerve the Rites of the Church of* England, *after having been admoniſhed by the Ordinary,* &c. *or that ſhall ſay or hear private Maſs,* &c. *ſhall refuſe a ſecond Tender of the Oaths, he ſhall be guilty of High Treaſon, but without Corruption of Blood.* Vide infra Ch. 19.

Sect. 85. Secondly Offences againſt the Proteſtant Succeſſion made High Treaſon are twofold:

1. Denying the Power of the Parliament to limit the Succeſſion of the Crown, which is made High Treaſon, by 4 *Annæ* 8. Par. 1, 2. and 6 *Annæ* 7. Par. 1, 2. whereby it is enacted, *That whoever ſhall maliciouſly, adviſedly and directly by Writing or Printing declare, maintain and affirm, That the pretended Prince of* Wales, *or any other hath any Right or Title to the Crown, otherwiſe than according to* 1 W. & M. ch. 2. or 12 W. 3. ch. 2. *or that the Kings of this Realm, by Authority of Parliament, are not able to make Laws to limit and bind the Crown and the Deſcent and Government thereof, ſhall be guilty of High Treaſon, and that thoſe that maliciouſly and directly affirm the ſame by Preaching, Teaching or adviſed ſpeaking, ſhall be guilty of a* Præmunire.

2. Endeavouring maliciouſly, adviſedly and directly to hinder any Perſon, who ſhall be next in Succeſſion, according to 1 *W. & M.* and 12 *W.* 3. which is made High Treaſon by 1 *Annæ* 17.

Sect. 86. 3. The Offence of liſting Men without the King's Licence is made High Treaſon by 12 *Annæ* 11. by which it is enacted; *That every Subject ſhall be guilty of High Treaſon, who ſhall in the Kingdom of* Great Britain *or* Ireland *liſt or enter himſelf in the Service of any foreign Prince or Perſon as a Soldier, or procure another to be ſo liſted, or to go beyond Sea with ſuch Intent, without the King's Licence, or in the* French *King's Service even with our King's Licence, until the ſaid* French *King ſhall have diſbanded all his* Engliſh *Regiments*, &c. But this Act is to continue but for three Years. [16.]

CHAP. XVIII.

Of Felonies more immediately againſt the King.

FElonies more immediately againſt the King are of five Kinds:

1. Offences relating to the Coin or Bullion.
2. Offences againſt the King's Council.
3. The Offence of paſſing beyond Sea to ſerve a foreign Prince.
4. Imbezilling the King's Armour.
5. The Offence of relieving a Popiſh Prieſt.

Felonies relating to the Coin or Bullion are of three kinds:

1. The Offence of debaſing it.
2. The Offence of unlawfully diminiſhing it.
3. The Offence of endeavouring by extraordinary Means to increaſe it.

Sect. 1. And firſt, The Offence of debaſing the Coin or Bullion was provided againſt by many ancient Statutes, which ſeem to be obſolete at this Day; for the Importation of ill Money was made Felony by 17 *Ed.* 3. N. 15. (which was never printed,) and ſo was the Payments of Blanks, (which were made of a baſe Alloy,) by 2 *H.* 6. 9. and the coining or bringing in Galley Half-pence, Seſkins or Doydekins, by 3 *H.* 5. 1. However it is made High Treaſon to bring in falſe Money, &c. by 25 *Ed.* 3. and 1 & 2 *Ph. & Mar.* 11. And by 8 & 9 *Will.* 3. 25. Par. 6. *It is made Felony to Blanch Copper for Sale, or to mix blanched Copper with Silver, or knowingly to buy or ſell, or offer to Sale blanched Copper alone, or mixt with Silver, or knowingly and fraudulently to buy*, &c. *any Mixture which ſhall be heavier than Silver, and look, and touch, and wear like Standard Gold, but be manifeſtly worſe, or to receive or pay any Counterfeit milled Money*, &c. *at a lower Rate than the ſame by its Denomination doth import, or was coined or counterfeited for.* [17.]

3 Inſt. 92, 93.

Supra Ch. 17.

Sect. 2. Secondly, The Offence of diminiſhing the Coin or Bullion of the Kingdom has been always thought to be of very ill Conſequence, as tending to impoveriſh the Nation, and to embarraſs Trade, and with an Eye to thoſe Inconveniencies it was made Felony by 17 *Ed.* 3. N. 15. (which was never printed) to tranſport Silver, except Plate carried over by Great Men to ſerve their Houſes; alſo the Tranſportation thereof was prohibited by many other Statutes, as 27 *Ed.* 3. 14. 5 *Rich.* 2. 2. 2 *H.* 4. 16. 2 *H.* 6. 6. and 3 *H.* 8. 1. But this general Reſtraint being found by Experience to be inconvenient to Trade; which by exporting Money to one Market may bring back ſuch Goods, as will more than make up the Loſs, from another, it was enacted by 15 *Car.* 2. 7. Par. 12. *That any Perſon might export any foreign Coin or Bullion without Duty, firſt making an Entry thereof in the Cuſtom-Houſe.* Poph. 149. Hob. 270. 3 Inſt. 92, 93.

Sect. 3. But this Licence having been often abuſed by the Tranſportation of ſuch Silver, which having been coined into *Engliſh* Money or wrought into Plate, was afterwards melted down into the Form of foreign Coin or Bullion, it was, in Order to prevent this Miſchief, enacted by 6 & 7 *Will.* 3. 17. Par. 3. *That none ſhall caſt or make Ingots or Bars of Silver in Imitation of* Spaniſh, *under Pain of five hundred Pounds.* And it is farther enacted by the ſaid Statute, Par. 5. *That no Perſon ſhall tranſport, or cauſe to be tranſported, any molten Silver, but only ſuch as ſhall be marked or ſtamped at Goldſmith's Hall,* &c. *nor even that without a Certificate under the Hands of one of the Wardens of the Goldſmiths Company, that Oath hath been made by the Owner or Owners thereof, and likewiſe by one credible Witneſs, that the ſame is lawful Silver, and that no Part thereof was (before the ſame was molten) the current Coin of this Realm, nor Clippings thereof, nor Plate wrought within this Kingdom,* &c.

Sect. 4. Alſo it is farther enacted, Par. 6. *That any Officer of the Cuſtom-Houſe may ſeize any molten Silver, which ſhall be put on Board any Veſſel, without having ſuch Mark or Stamp, and alſo ſuch Certificate, as is above mentioned.*

Sect. 5. And it is farther enacted, Par. 7. *That if any Broker, not being a trading Goldſmith, or Refiner of Silver, ſhall buy or ſell any Bullion or molten Silver, he ſhall ſuffer Impriſonment for ſix Months without Bail.*

Sect. 6. Alſo it is farther enacted, Par. 13, 14. *That if a Doubt ſhall ariſe upon Bullion ſhipped to be exported, whether the ſame be* Engliſh *or Foreign, the Proof ſhall lie upon the Owner,* &c. *And that if any Perſon ſhall enter or ſhip any Bullion, by the ſaid Act allowed to be exported, other than in the Name of the true Owner, Proprietor or Importer, the Exporter ſhall forfeit the ſame, or the full Value thereof.*

Sect. 7. Thirdly, The Endeavours of ſome Perſons in making Uſe of extraordinary Methods for the producing of Gold and Silver, were found by Experience to be ſo prejudicial to the Publick, both from the laviſh Waſte of many valuable Materials, and alſo from the Ruin of many Families, which had been occaſioned by ſuch uſeleſs Expences, that it was thought neceſſary to put a Check to ſuch Practices by ſome ſevere Law, and for that Purpoſe it was made Felony, by 5 *H.* 4. 4. *to multiply Gold or Silver, or to uſe the Art or Craft of Multiplication.* And it was holden, That the practiſing to find out the Philoſophers Stone, by which it is imagined that all Metals may be made Gold, was Felony within this Statute: But this Reſtraint having been found to have no other Effect, upon the unaccountable Vanity of thoſe, who fancied ſuch Attempts to be practicable, but only to ſend them beyond Sea, to try their Experiments with Impunity in other Countries, the Statute of 5 *H.* 4. was at laſt wholly repealed by 1 *Will.* & *Mar.* 30. Dyer. 88. Pl. 105.

Sect. 8.

Supra Ch. 17. Sect. 40.

Sect. 8. As to the ſecond Kind of Felonies more immediately againſt the King, *viz.* thoſe which are againſt his Council, it is enacted by 3 *H.* 7. 14. *That if any ſworn Servant in the Chequer-Roll of the King's Houſhold, under the State of a Lord, make any Confederacy, Compaſſing, Conſpiracy or Imagination with any Perſon to deſtroy or murder the King, or any Lord of this Realm, or any other Perſon ſworn to the King's Council, he ſhall be guilty of Felony.*

Sect. 9. And it is farther enacted by 9 *Annæ, Chap.* 16. *That if any Perſon ſhall attempt to kill, aſſault, ſtrike or wound any Privy Counſellor in Execution of his Office, he ſhall ſuffer as a Felon without Clergy.*

3 Inſt. 80. Dalt. ch. 107. Cawley 182.

Sect. 10. As to the third Offence of this Kind (*viz.*) That of paſſing beyond Sea to ſerve a foreign Prince, it is enacted by 3 *Jac.* 1. 4. Par. 18, 19, 20, 21. *That every Subject, who ſhall go out of the Realm to ſerve any foreign Prince or State, or ſhall paſs over the Seas, and there voluntarily ſerve any ſuch foreign Prince or State, not having before his going taken the Oath of Obedience, ſhall ſuffer as a Felon; and that if any Gentleman, or Perſon of higher Degree, or any Perſon who hath born any Office or Charge in Camp or Army, ſhall go out of the Realm to ſerve ſuch foreign Prince,* &c. *without being bound with two Sureties in a Bond, conditioned that he ſhall not be reconciled to the See of* Rome, *nor enter into any Conſpiracy againſt the King, he ſhall be a Felon.*

See the next Chapter.

Sect. 11. Note, That by 1 *Will. & Mar.* Seſſ. 1. Chap. 8. this Oath of Obedience is taken away, and the new Oaths of Allegiance and Supremacy enjoined in the Room thereof.

Sect. 12. As to the fourth Offence of this Kind, *viz.* That of imbezilling the King's Armour, it is enacted by 31 *El.* 4. *That if any Perſon, having the Charge or Cuſtody of the King's Armour, Ordnance, or Munition,* &c. *or of any Victuals provided for the victualling of any Soldiers or Mariners,* &c. *ſhall for Lucre and Gain, or wittingly, adviſedly, and of Purpoſe to hinder or impeach the King's Service, imbezil, purloin, or convey away any of the ſame Armour,* &c. *to the Value of twenty Shillings, he ſhall be judged guilty of Felony.*

3 Inſt. 78, 79. Cawley 90, 91.

Sect. 13. *But ſuch Offender muſt be proſecuted within the Year next after the Offence done; neither ſhall he forfeit his Hereditaments any longer than during his Life; nor ſhall his Blood be corrupted, or his Wife loſe her Dower.*

Sect. 14. As to the fifth Offence of this Kind, *viz.* That of relieving a Popiſh Prieſt, it is enacted by 27 *El.* 2. Par. 4. *That whoever ſhall wittingly, and willingly receive, relieve, comfort, aid or maintain any Jeſuit, Seminary or other Popiſh Prieſt,* &c. *being at Liberty or out of Hold, knowing him to be ſuch a Jeſuit,* &c. *ſhall for ſuch Offence be adjudged a Felon without Benefit of Clergy.*

CHAP. XIX.

Of Præmunire.

OFfences more immediately againſt the King, not capital, come generally under the Titles of *Præmunire*, Miſpriſion, and Contempts. In treating of *Præmunire* I ſhall conſider,

1. What Offences come under this Notion.
2. How they are puniſhed.

And first, Offences coming under the Notion of *Præmunire*, ſeem to be reducible to the following general Heads;

1. Offences againſt the Prerogative of the Crown.
2. Offences againſt the Authority of the King and Parliament.

Thoſe of the firſt Kind ſeem to come under the following Particulars;

1. Making Uſe of Papal Bulls.
2. Derogating from the King's Common Law Courts.
3. Appealing to *Rome* from any of the King's Courts.
4. Exerciſing the Juriſdiction of a Suffragan without the Appointment of the Biſhop of the Dioceſe.
5. Refuſing to elect or conſecrate the Perſon nominated by the King to a Biſhoprick.
6. Maintaining the Pope's Power.
7. Bringing in *Agnus Dei*.
8. Contributing to the Maintenance of a Popiſh Seminary.
9. Refuſing the Oaths.

Sect. 1. But inaſmuch as theſe Offences depend chiefly upon Statutes made for the Preſervation of the Sovereignty of the Crown from the Incroachments of the See of *Rome*, I ſhall, in order to ſhew the Reaſonableneſs of theſe Laws, take a ſhort View of thoſe Uſurpations, which made them neceſſary.

Sect. 2. It is the general Opinion, That Chriſtianity was firſt planted in this Iſland by ſome of the Eaſtern Church, which is very probable, from the ancient *Britons* obſerving *Eaſter* always on the fourteenth Day of the Month, according to the Cuſtom of the Eaſt. Davis 88. con. Selden's Janus Anglorum 27.

Sect. 3. But the *Saxons* being converted about the Year 600. by Perſons ſent from *Rome*, and wholly devoted to the Intereſt thereof, it cannot be expected that ſuch an Opportunity of enlarging the Juriſdiction of that See ſhould wholly be neglected.

Sect. 4. [a] And yet *Parſons*, in his Attempt to anſwer Sir *Edward Coke*'s fifth Report concerning the King's Eccleſiaſtical Authority, is ſcarce able to produce any Inſtances of the Papal Power in this Kingdom before the *Norman* Conqueſt. Indeed he tells us, That four or five Perſons were made Biſhops by the Pope at the firſt Converſion, but offers not any Example thereof between the Year 669 and the Conqueſt; and it is certain, That all Biſhopricks were then conferred by the King's Delivery of a Ring and a Paſtoral Staff.

Sect. 5. [b] Neither is he able to produce any Inſtance, that looks like an Appeal to *Rome* before the Conqueſt, except in the Caſe of two Biſhops, and he is forced to own, That even one of the Biſhops was depoſed by two Kings, and could get no Relief againſt either of them, notwithſtanding the Pope's utmoſt Application in his Favour.

Sect. 6. Nor can he ſhew more than four or five Inſtances of Exemptions from ordinary Juriſdiction, granted or confirmed by Popes to Religious Houſes in thoſe Days, which plainly ſhews that this Concurrence was not thought neceſſary; and it appears, That our ancient Kings, of their own Authority, exempted ſome Abbeys from Epiſcopal Juriſdiction; and it hath always been a received Rule, even in the Times of Popery, That the Chancellor ſhall viſit a Church of the King's Foundation, notwithſtanding it be not ſpecially exempted.

[a] Parſon's ch. 6. Par. 12, 20, 21, 22, 24, 25, 57, 59: See Barrow from Page 258 to 262. 1 Ro. Ab. 882. 1 Inſt. 134. a. 344. a. Selden's Janus Anglorum 42, 65.

[b] Parſons ch. 6. Par. 29, 30, 31, 32, 50, 51, 52, 53, 54, 55, 56. See Barrow from Page 242 to 258. Selden's Janus Anglorum 59, 67, 68.

Parſons ch. 6. from Par. 37 to 48. 1 H. 7. 25. 21 Ed. 3. 60. a. b. 1 Inſt. 144. a. F. N. B. 42. a. 27 Ed. 3. 85. a. 6 H. 7. 14. a. 2 Rol. Abr. 230, 231.

Davis 89. *Sect.* 7. But the Pope, having favoured and ſupported *William* the firſt in his Invaſion of the Kingdom, took that Opportunity of enlarging his Incroachments, and in this King's Reign began to ſend his Legates hither; and prevailed at firſt with *Henry* the firſt, and afterwards with King *John*, to give up the Donation of Biſhopricks; and in the Time of King *Stephen* gained the Prerogative of Appeals; and, in the Time of *Henry* the ſecond, exempted all Clerks from the Secular Power.

Davis 90, 93. 2 Ro. Re. 103. Palm. 25, 26. Selden's Janus Anglorum 67.

Sect. 8. Indeed this King did at firſt ſtrenuouſly withſtand theſe Innovations, and aboliſhed moſt of them by the Conſtitutions of *Clarendon*: But upon the Death of *Becket*, who, for having violently oppoſed the King, was ſlain by ſome of his Servants, the Pope got ſuch an Advantage over the King, that he was never after able effectually to execute thoſe Laws.

Selden's Epinomis, cap. 8. Dav. Rep. 91.

Sect. 9. And not long after this, by a general Excommunication of the King and People, for ſeveral Years, becauſe they would not ſuffer an Archbiſhop to be impoſed upon them, King *John* was reduced to ſuch Straits, that he was obliged to ſurrender his Kingdoms to the Pope, and to receive them again, to hold of him for the Rent of a Thouſand Marks.

Sect. 10. And in the following Reign of *Henry* the third, partly from the Profits of our beſt Church Benefices, which were generally given to *Italians*, and others reſiding at the Court of *Rome*, and partly from the Taxes impoſed by the Pope, there went yearly out of the Kingdom Seventy thouſand Pounds Sterling.

2 Inſt. 584. Dav. 95.

Sect. 11. The Nation being under this Neceſſity was obliged to provide for the Prerogative of the Prince and the Liberties of the People, by many ſtrict Laws. And in the Reign of *Edward* the firſt, Religious Houſes were prohibited, under high Penalties, to ſend any Thing to their Superiors beyond Seas; and it was declared by Parliament, That the Pope's taking upon him to diſpoſe of *Engliſh* Benefices to Aliens was an Incroachment not to be endured; and ſoon after, theſe Grievances produced thoſe more ſevere Laws againſt the abovementioned Offences of this Nature, the Particulars whereof are before ſet forth.

2 Inſt. 580.

Sect. 12. And firſt the Offence of making Uſe of Papal Bulls is made a *Præmunire* by many ancient as well as later Statutes; for it is enacted by 25 *Ed.* 3. called the Statute of Proviſors, *That whoever ſhall by a Papal Proviſion diſturb any Patron to preſent to a Benefice*, &c. *ſhall be fined and impriſoned till he make full Renunciation*, &c. And it is farther enacted by 25 *Ed.* 3. Stat. 5. Chap. 22. *That if any one purchaſe a Proviſion of an Abbey or Priory, he ſhall be out of the King's Protection.* And by 38 *Ed.* 3. & 12 *R.* 2. 15. & 13 *R.* 2. Stat. 2. Chap. 2. *That whoever ſhall accept a Benefice contrary to* 25 Ed. 3. *ſhall be baniſhed.* And by 13 *R.* 2. Stat. 2. Chap. 3. *That whoever ſhall bring a Sentence of Excommunication againſt any Perſon for executing the ſaid Statute of* 25 Ed. 3. *ſhall ſuffer Pain of Life and Member.* And by 16 *R.* 2. 5. *That whoever ſhall purchaſe or purſue, or cauſe to be purchaſed or purſued, in the Court of* Rome *or elſewhere, any Tranſlations, Proceſſes, Sentences of Excommunication, Bulls, Inſtruments or other Things contrary to the Tenor of that Statute, which touch the King, againſt him, his Crown, his Regality or his Realm, or bring them within this Realm, or receive them*, &c. *ſhall be out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeited to the King; and they ſhall be attached by their Bodies*, &c. And by 2 *H.* 4. 3. *That whoever ſhall purchaſe from* Rome *a Proviſion of Exemption from ordinary Obedience*; and by 2 *H.* 4. 4. *That whoever ſhall put in Execution Bulls purchaſed by thoſe of the Order of Ciſteaux to be diſcharged of Tithes, ſhall incur the like Penalty.* Alſo Offenders

See Regiſter 64. a. 3 Inſt. 127.

of this Nature are farther reſtrained by 6 *H.* 4. 1. 7 *H.* 4. 8. 9 *H.* 4. 8. & 3 *H.* 5. 4. *By which the Statutes above mentioned are enforced and explained.* And it is farther enacted by 23 *H.* 8. 21. Sect. 22. *That whoever ſhall ſue for, or execute any Licence, Diſpenſation, or Faculty from the See of* Rome; and by 28 *H.* 8. 16. (by which all Bulls, Briefs, &c. heretofore obtained from *Rome*, are made void) *That whoever ſhall uſe, alledge, or plead the ſame in any Court, unleſs they were confirmed by that Statute, or afterwards by the King, ſhall incur the like Penalty.* Yet it hath been holden, That the alledging of an ancient Bull in order to induce another principal Matter, whereon to ground a Title without claiming any Thing from the Bull it ſelf, is not within this Statute. 2 Lev. 251.

Sect. 13. By 13 *El.* 2. thoſe who purchaſe any Bull, &c. from *Rome*, are guilty of High Treaſon. But thoſe ancient Statutes ſtill continue in force; and it is in the Election of the Crown to proceed either upon them, or 13 *El.* Alſo by the ſaid Statute of 13 *El. The Aiders, Comforters, and Maintainers of ſuch Offenders after the Offence, to the Intent to uphold the ſaid uſurped Power, incur a* Præmunire. 1 H. H. P. C. 643. Vide ſupra Chap. 17. Davis 84.

Sect. 14. The ſecond Offence of this Nature, *viz.* That of derogating from the King's Common Law Courts, is ſaid to have been a High Offence at Common Law, and is made a *Præmunire* by many ancient Statutes; for by 27 *Ed.* 3. 1. & 38 *Ed.* 3. of Proviſors, *If any Subject draw any out of the Realm in Plea, whereof the Cognizance pertains to the King's Court, or of Things whereof Judgments be given in the King's Court, or ſue in any other Court to defeat or impeach the Judgments given in the King's Court, he ſhall be warned to appear,* &c. *in proper Perſon, at a Day containing the ſpace of two Months; at which if he appear not, he and his Proctors,* &c. *ſhall be put out of the King's Protection, his Lands and Chattels forfeited, his Body impriſoned and ranſomed at the King's Will,* &c. 2 Rol. Abr. 176. O. 3. 177. P. 1. 3. Raſtal's Entr. 466. b. 467. b. B. 2. C. 48. S. 9. 3 Inſt. 125. Bro. Præmunire 3.

Sect. 15. And by 16 *Rich.* 2. 5. *Both thoſe who ſhall purſue or cauſe to be purſued in the Court of* Rome *or elſewhere, any Proceſſes or Inſtruments, or other Things whatſoever which touch the King, againſt him, his Crown, and Regality or his Realm, and alſo thoſe who ſhall bring, receive, notify or execute them, and their Abbettors,* &c. *ſhall be put out of the King's Protection,* &c.

Sect. 16. In the Conſtruction of theſe Statutes it was holden, That certain Commiſſioners of Sewers for ſummoning one before them who had got a Judgment at Law, and impriſoning him till he would releaſe it, were guilty of a *Præmunire.* 2 Bulſt. 299. 3 Inſt. 125. Cro. Ja. 336.

Sect. 17. Alſo there have been formerly many ſtrong Opinions, That [a] Suits in Equity to relieve againſt a Judgment at Law are within theſe Statutes; eſpecially if the End thereof be to controvert the very Point determined at Law, or to ſeek Relief after Judgment in a Caſe wherein the Law may relieve, as againſt Exceſſiveneſs of Damages, &c. But it ſeems to be generally agreed at this Day, That no ſuch Suit is within the Intention of the ſaid Statutes. [a] 3 Inſt. 123. 124. See 4 H. 4. Ch. 23. 2 Chan. Caſes 97. Dy. 201. Pl. 64, 301. a. 1 Lev. 241, 242.

Sect. 18. It hath been ſaid, That [b] Suits in the Admiralty or Eccleſiaſtical Courts within the Realm are within 16 *R.* 2. 5. (by Force of thoſe Words, *or elſewhere*) if they concern Matters, the Cognizance whereof belongs to the Common Law; as where a Biſhop deprives an Incumbent of a Donative, or excommunicates a Man for hunting in his Parks, &c. or where [c] Commiſſioners of Sewers impriſon a Man for not releaſing a Judgment at Law. Hard. 125. 1 Danv. Abr. 764. Pl. 2. 1 Sid. 463. 1 Mod. 59. 3 Keb. 221. [b] 2 Bulſ. 299. 1 Ro. Re. 190.

Sect. 19. But it ſeemeth, That a Suit in thoſe Courts for a Matter which appears not by the Libel it ſelf, but only by the Defendant's Plea, or [c] 3 Inſt. 120, 121, 122. Bro. Præmun. 5, 12, 16, 31. 15 H. 7. 9. a.

12 Co. 37. 2 Rol. A. 177. Pl. 2. Mcor 838. 12 Co. 37. Cro. Jac. 134.

or other Matter ſubſequent, to be of temporal Cognizance, (as where a Plaintiff libels for Tithes, and the Defendant pleads that they were ſevered from the nine Parts, by which they became a Lay Fee) is not within the Statute, becauſe it appears not that the either Plaintiff or the Judge knew that they were ſevered.

Sect. 20. The third Offence of this Nature, (*viz.*) That of appealing to *Rome* from any of the King's Courts, is made a *Præmunire* by 24 *H.* 8. 12. and 25 *H.* 8. 19. by which it is enacted, *That all ſuch Appeals, as formerly were made to* Rome, *ſhall from henceforth be made to the High Court of Chancery.*

Sect. 21. The fourth Offence of this Nature, (*viz.*) That of exerciſing the Juriſdiction of a Suffragan, without the Appointment of the Biſhop of the Dioceſe, is made a *Præmunire* by 26 *H.* 8. 14. which ſets forth at large for what Towns ſuch Suffragans may be nominated by the King, and alſo how they may be nominated, conſecrated and commiſſioned.

Sect. 22. The fifth Offence of this Nature, (*viz.*) That of refuſing to elect or conſecrate the Perſon nominated by the King to a Biſhoprick, is made a *Præmunire* by 25 *H.* 8. 20. *Par.* 7. by which it is enacted, *That if any Dean and Chapter refuſe to elect the Perſon named in the King's Letter for a Biſhoprick, and to ſignify ſuch Election to the King within twenty Days after the Licence ſhall come to their Hands, or if any Archbiſhop or Biſhop after ſuch Election (or Nomination by the King in Default thereof ſignified unto them by the King) ſhall refuſe within twenty Days to confirm and conſecrate the Perſon ſo ſignified to them, they incur a* Præmunire.

See Chap. 17. *Sect.* 23. The ſixth Offence of this Nature, (*viz.*) That of maintaining the Pope's Power, is made a *Præmunire* upon the firſt Conviction, and High Treaſon upon the ſecond.

Sect. 24. The ſeventh Offence of this Nature, (*viz.*) That of bringing in *Agnus Dei*, is made a *Præmunire* by 13 *El.* 2. Par. 7, 8. by which it is enacted, *That if any one ſhall bring into the Realm*, &c. *any* Agnus Dei, *Croſſes, Pictures, Beads, or ſuch like ſuperſtitious Things pretended to be hallowed by the Biſhop of* Rome, &c. *and ſhall deliver or offer the ſame to any Subject to be worn or uſed in any wiſe; or if any one ſhall receive the ſame to ſuch Intent, and not clear himſelf by diſcovering the Offender*, &c. *he ſhall incur a* Præmunire.

Cawley 52, 53.

Cawley 54.

Sect. 25. *And ſo ſhall a Juſtice of Peace in the ſame County, who having any Offence in that Act declared unto him, ſhall not declare it to a Privy Counſellor, within ſixteen Days.*

Sect. 26. The eighth Offence of this Nature, (*viz.*) That of contributing to the Maintenance of a Popiſh Seminary, is made a *Præmunire* by 27 *El.* 2. Par. 6.

Sect. 27. The ninth Offence of this Nature, (*viz.*) That of refuſing the Oaths, is made a *Præmunire* by ſeveral Statutes, for by 1 *El.* 1. Par. 19. it is enacted, *That all Eccleſiaſtical Perſons, and all Eccleſiaſtical and Temporal Officers, and all Perſons having the King's Fees or Wages*; and by Par. 26. *That all Perſons taking Orders, or any Degree in any Univerſity within the Realm, ſhall take the Oath of Supremacy under Pain of loſing their Benefices and Offices.* And it is farther enacted by 5 *El.* 1. Par. 5. *That all the Perſons above mentioned, who are required by the ſaid Statute of* 1 El. 1. *to take the ſaid Oath, and all School-maſters, publick and private, Barriſters, Benchers, Readers, Ancients in any Houſe of Court*, &c. *Attornies, Sheriffs, and Officers belonging to the Common or any other Law, or to the Crown, or to any Court whatſoever, ſhall take the ſaid Oath in open Court, before they ſhall be admitted to any ſuch Vocation or Office*, &c. *And if they belong not to any Court, That then they ſhall take the ſame before ſuch Perſon as ſhall admit them to ſuch Vocation*, &c. *or before Commiſſioners appointed under the Great Seal*, &c. And it is farther

enacted Par. 6. *That any Biſhop may tender the ſaid Oath to any ſpiritual Perſon within his Dioceſe, as well in Places exempt as others*; and by Par. 7. *That Commiſſioners may be appointed by the Lord Chancellor to tender the ſame to ſuch Perſons as by their Commiſſion they ſhall be authorized to tender it unto*; and by Par. 8. *That if any Perſon, compellable by either of the ſaid Acts, or appointed by ſuch Commiſſioners to take the ſaid Oath, ſhall refuſe to take it on a Tender thereof, he ſhall incur a* Præmunire. And by Par. 9. *That ſuch Refuſal ſhall be certified within forty Days before the King in his Court of King's Bench, by thoſe who have Authority to tender the ſaid Oath, under the Penalty of one hundred Pounds; and that the Sheriff of the County, wherein the ſaid Court ſhall ſit, may impanel a Jury who ſhall inquire of ſuch Rufuſal in ſuch Manner, as if it had happened in the ſame County.*

In the Conſtruction of theſe Statutes it hath been reſolved:

Sect. 28. I. That the Obligation to take the ſaid Oath continued after the Death of Queen *Elizabeth*, tho' the Statutes ſay nothing of her Succeſſors; and the like Reſolution alſo has been made in Relation to the Oaths appointed by ſubſequent Statutes. Raym. 212. 1 Vent. 171. 2 Keb. 825.

Sect. 29. II. That in a Commiſſion authorizing Perſons to tender the ſaid Oath, a general Deſcription of the Perſons to whom it ſhall be tendred is ſufficient, without naming them particularly by their Names. Raym. 445.

Sect. 30. III. That if the Perſon who tendered the Oath as Biſhop, was not a Biſhop at that Time, the Defendant may give it in Evidence upon the general Iſſue. Dy. 234. Pl. 15.

Sect. 31. IV. That the ſaid Oath muſt in Subſtance be taken in the very Words expreſſed in the Acts, and cannot be qualified with any Reſerve whatever: Yet it hath been reſolved, That to uſe the Words [In Conſcience] inſtead of [in my Conſcience] or [Sea of *Rome*] inſtead of [See of *Rome*] makes no material Variance. 1 Bulſt. 197, 198. 1 Vent. 172, 173.

Sect. 32. V. That a Certificate of a Refuſal of the ſaid Oath made to the Judges of the ſaid Court of the King's Bench by Name, and not to the King in his ſaid Court, is ſufficient within the Meaning of the Statute. Raym. 445.

Sect. 33. VI. That an Eccleſiaſtical Perſon is well deſcribed in ſuch a Certificate by the Addition of *Legum Doctor, & Sacris Ordinibus conſtitutus*, without adding *Clericus, &c.* Dy. 234. Pl. 15.

Sect. 34. VII. That ſuch a Certificate being entered of Record, as brought into Court ſuch a Day and Year *per* A. B. *Cancellar.* of ſuch a Biſhop is good, without entering that it was ſo brought *per Mandatum Epiſcopi*. Dy. 234. Pl. 15.

Sect. 35. VIII. That the Trial muſt be by a Jury of the County, wherein the Oaths were refuſed; for the Statute only authorizes an Indictment by a Jury of the County, wherein the Court ſits. Dy. 234. Pl. 15.

Sect. 36. IX. That any Miſrecital of the very Words of the Oath, in an Indictment for not taking it, is erroneous. See the Books above cited.

Sect. 37. By 3 *Jac.* 1. 4. Par. 13, 14. *Any Biſhop, or two Juſtices of Peace, whereof one is to be of the* Quorum, *might tender the Oath of Obedience therein preſcribed, to any Perſon above the Age of eighteen Years, being under the Degree of Nobility, and convicted or indicted of Recuſancy, or not having received the Sacrament twice in the Year paſt, and alſo to any ſuſpected Stranger who ſhall not purge himſelf upon Oath; and ſhall certify the Names of ſuch as take the ſaid Oath to the next Quarter-Seſſions, and commit thoſe who refuſe it till the next Aſſizes or Seſſions, where the ſame ſhall be again tendered; and if the ſaid Perſons, or any other Perſons whatſoever of the Age of eighteen Years, other than Noblemen or Noblewomen, ſhall there refuſe to take it, they incur a* Præmunire, *unleſs they be Femes Covert, who ſhall be committed till they take it.* Skin. 11.

Sect. 38. By Par. 41. *The Lords of the Council in like manner may tender the ſaid Oath to any Nobleman or Woman, of the Age of eighteen Years, who refuſing the ſame incur a* Præmunire, *Femes Covert excepted.*

Sect. 39. By 7 *Jac.* 1. 6. Par. 2, 26, 27. *All Perſons whatſoever, as well Eccleſiaſtical as Temporal, of what Eſtate, Dignity, Pre-eminence, Sex, Quality or Degree ſoever he or ſhe ſhall be, above the Age of eighteen Years, being in that Act mentioned and intended, ſhall take the ſaid Oath; and any Privy Counſellor or Biſhop, within his Dioceſe, may require any Baron or Baroneſs, of the Age of eighteen Years, and any two Juſtices of the Peace, whereof one to be of the* Quorum, *may require any other Perſon of that Age to take it. And if any Perſon of or above the ſaid Age and Degree ſhall be preſented,* &c. *for not coming to Church,* &c. *then three of the Privy Council, whereof the Lord Chancellor,* &c. *to be one, ſhall require ſuch Perſon to take the ſaid Oath. And if any Perſon whatſoever, of the ſaid Age and under the ſaid Degree, ſhall be preſented,* &c. *for not coming to Church,* &c. *or if the Miniſter,* &c. *ſhall complain to any Juſtice of Peace,* &c. *and the Juſtice ſhall find Cauſe of Suſpicion, then any one Juſtice of Peace ſhall require ſuch Perſon to take the ſaid Oath,* &c. *And all ſuch Perſons refuſing a Tender of the ſaid Oath, ſhall be bound over to the Aſſizes or Seſſions, where if they refuſe again, they incur a* Præmunire: And Par. 27. *All ſuch Refuſers are diſabled to execute any publick Place of Judicature, or bear any other Office, (being no Office of Inheritance or miniſterial Function) or to practiſe the Common or Civil Law, Phyſick or Surgery, or the Art of an Apothecary.*

See Cawley 246, &c.

12 Co. 130, 131.

Sect. 40. In the Conſtruction of theſe Statutes it hath been reſolved, That the Juſtices of Peace, *&c.* may ſend their Warrant to bring ſuch Perſons before them, but that they cannot authorize the Conſtable to break open the Doors to take them.

Sect. 41. But by 1 *Will. & Mar. the Oaths of Supremacy and Obedience preſcribed by theſe Acts were abrogated, and the following Oath and Declaration ſubſtituted in their Room.*

I A. B. *do ſincerely promiſe and ſwear, That I will be faithful and bear true Allegiance to his Majeſty King* George.

I A. B. *do ſwear, That I do from my Heart abhor, deteſt and abjure, as impious and heretical, that damnable Doctrine and Poſition, that Princes excommunicated or deprived by the Pope, or any Authority of the See of* Rome, *may be depoſed or murdered by their Subjects, or any other whatſoever:*

And I do declare, That no foreign Prince, Perſon, Prelate, State, or Potentate, hath or ought to have any Juriſdiction, Power, Superiority, Preeminence or Authority Eccleſiaſtical or Spiritual, within this Realm.

Sect. 42. And by Par. 3, 4, 5. *All Perſons who are required to take, or authorized to tender the ſaid abrogated Oaths, or either of them, are in like manner required and authorized to take and tender the ſaid Oath and Declaration, under the ſame Penalties,* &c. See Chap. 24.

Sect. 43. By 7 *Will.* 3. 24. *Serjeants at Law, Counſellors, Attornies, Solicitors, Proctors, Clerks or Notaries, practiſing as ſuch in any Court whatſoever, without taking the ſaid Oaths and ſubſcribing the ſaid Declaration, incur a* Præmunire.

Sect. 44. And now I am in the ſecond Place to conſider thoſe Offences againſt the Authority of King and Parliament, which come under the Notion of *Præmunire*, as to which it is enacted by 6 *Ann.* 7. *That if any Perſon ſhall maliciouſly and directly, by Preaching, Teaching, or adviſed Speaking, declare, maintain and affirm, that the pretended Prince of* Wales, *hath*

ny Right or Title to the Crown of theſe Realms, or that any other Perſon or Per-ons hath or have any Right or Title to the ſame, otherwiſe than according to Will. & Mar. 2. *and* 12 Will. 2. *and the Acts then lately made in* England *nd* Scotland, *mutually for the Union of the two Kingdoms; or that the Kings r Queens of this Realm, with the Authority of Parliament, are not able to make Laws to limit the Crown and the Deſcent,* &c. *thereof, ſhall incur a* Præmunire.

Sect. 45. As to the ſecond general Point of this Chapter, *viz.* In what manner Offences of this Nature are puniſhed, it is to be obſerved, That moſt of the Statutes of *Præmunire* refer the Puniſhment to 16 *Rich.* 2. 5. which enacts, That thoſe who offend againſt the Purport thereof *ſhall be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeited to our Lord the King: And that they be attached by their Bodies if they may be found, and brought before the King and his Council, there to anſwer to the Caſes aforeſaid, or that Proceſs be made againſt them by* Præmunire facias, *in Manner as is ordained in other Statutes of Proviſors.*

Sect. 46. Inaſmuch as this Statute expreſly ſaith, that ſuch Offenders ſhall be put out of the King's Protection, and alſo the Statute of 25 *Ed.* 3. Stat. 5. Chap. 22. had farther added, *That any one might do with a Purchaſer of the Proviſions, therein prohibited as with the King's Enemy, and that he who ſhould offend againſt ſuch an one in Body, Lands, or Goods, ſhould be excuſed,* it was formerly holden, That a Perſon attainted in a *Præmunire* might lawfully be ſlain by any one, as being the King's Enemy and out of the Protection of the Laws, but the latter Opinions ſeem to have diſapproved of this Severity; however it is expreſly enacted by 5 *El.* 1. Par. 21, 22. *That it ſhall not be lawful to kill any Perſon attainted in* Præmunire, *ſaving ſuch Pains of Death or other Hurt or Puniſhment, as heretofore might, without Danger of Law, be done upon any Perſon that ſhall ſend or bring into the Realm, or within the ſame ſhall execute, any Proceſs,* &c. *from the See of* Rome.

1 Inſt. 130. 12 Co. 68. 3 Inſt. 128. Bro. Cor. 197.

Sect. 47. But howſoever the Law may ſtand in Relation to ſuch Perſons as are within the Exception of this Act, it is certain that no Perſon whatſoever attainted of any *Præmunire* can bring an Action for any Injury whatſoever; and that no one knowing him to be guilty can with Safety give him Aid, Comfort, or Relief.

1 Inſt. 130. See 1 El. 1. Par. 39.

Sect. 48. But it hath been reſolved, That thoſe general Words in the Statute 16 *Rich.* 2. 5. That all the Lands and Tenements ſhall be forfeited, extend not to Land entailed, after the Death of the Offender.

1 Inſt. 130. 3 Inſt. 126. 2 Lev. 169. B. 2. ch. 49. Sect. 28.

Sect. 49. Alſo it hath been reſolved, That a Statute, by appointing that an Offender ſhall incur the Penalty and Danger mentioned in the 16 *Rich.* 2. 5. does not confine the Proſecution for the Offence to the particular Proceſs thereby given.

1 Vent. 173. For the Judgment in Præmunire ſee B. 2. ch. 48. Sect. 9.

CHAP. XX.

Of Miſpriſion of Treaſon.

Sect. 1. THE Word Miſpriſion has not any certain Signification, but is generally applied to all ſuch high Offences as are under the Degree of Capital, and nearly bordering thereupon; and it is ſaid that a Miſpriſion is contained in every Treaſon or Felony whatſoever, and that one

2 R. 3. 10. b. S. P. C. 37. b. Bro. Cor. 174. Treaſ. 25, 31.

1 H. H. P. C. 374, 652, 708. one who is guilty of Felony or Treaſon may be proceeded againſt for a Miſpriſion only, if the King pleaſe.

Offences of this Kind are generally ſaid to be twofold:

1. Negative, which conſiſt in the Omiſſion of ſomething which ought to be done,
2. Poſitive, which conſiſt in ſome Miſdemeanour actually committed.

Sect. 2. The negative Miſpriſion more immediately againſt the King is commonly called Miſpriſion of Treaſon, which is an Offence conſiſting in the bare Knowledge and Concealment of High Treaſon, (whether it be ſuch by 25 *Ed.* 3. or ſubſequent Statutes) without any Degree of Aſſent thereto; and this is declared to be a Miſpriſion only by 2 & 3 *Mar.* 10. But at Law any Delay in diſcovering High Treaſon, whatever Excuſes the Party might have for it, was deemed an Aſſent to it, and conſequently High Treaſon. [18.]

1 H. H. P. C. 371, 372. H. P. C. 127. Bract. 118. b. S. P. C. 37. b. 3 Inſt. 36.

Sect. 3. And at this Day if the Concealment of High Treaſon be accompanied with any Circumſtances, which ſhew an Approbation thereof, it amounts to High Treaſon; as if one, having Notice before-hand that Perſons deſigned to meet in order to conſpire againſt the Government, go into their Company and hear their treaſonable Conſultation and conceal it; or if one, who has been once accidentally in ſuch Company, and heard ſuch Diſcourſe, meet the ſame Company a ſecond Time, and hear ſuch like Diſcourſe, and conceal it.

H. P. C. 127. Kely. 17, 21.

Sect. 4. Alſo whoever receives and comforts a Traitor, knowing him to be ſuch, whether by counterfeiting of Coin [a], or otherwiſe, is himſelf a principal Traitor; for ſuch a Receipt of a Felon makes the Receiver an Acceſſary to the Felony, and whatever makes an Acceſſary in Felony, makes a Principal in Treaſon.

3 H. 7. 10. H. P. C. 127. 3 Inſt. 138. 12 Co. 81, 82. Con. Dy. 296. Pl. 21. Infra B. 2. ch. 29.

Sect. 5. [b] Neither can a Perſon, who has Knowledge of a Treaſon, ſecure himſelf by diſcovering that there will be a Riſing in general, without diſcloſing the very Perſons intending to riſe; nor even by diſcovering of theſe to a private Perſon, who is no Magiſtrate.

Sect. 6. [c] But it ſeems that one who is only told in general that there will be a Riſing, without knowing any of the Perſons, or Particulars of the Deſign, is not bound to make any Diſcovery at all.

[a] Quære and ſee 1 H. H. P. C. 233, 234, 237, 613.
[b] Kely. 22. H. P. C. 127. S. P. C. 37. b.
[c] Kely. 22.

Sect. 7. There is one poſitive Miſpriſion which is made Miſpriſion of Treaſon by 14 *El.* 3. by which it is enacted, That thoſe who forge foreign Coin, not current here, are guilty of Miſpriſion of Treaſon, *&c.*

1 H. H. P. C. 376, 377.

CHAP. XXI.

Of Contempts againſt the King's Courts.

OTHER poſitive Miſpriſions more immediately againſt the King ſeem reducible to the following Heads:

1. Contempts againſt his Palace or Courts of Juſtice.
2. Contempts againſt his Prerogative.

3. Contempts againſt his Perſon or Government.
4. Contempts againſt his Title.

Sect. 1. And firſt, Contempts againſt the King's Palace, *&c.* have always been looked upon as very high Miſpriſions, and by the ancient Law before the Conqueſt, Fighting in the King's Palace was a capital Offence; and by 33 *H.* 8. 12. Par. 7. Malicious Striking in the King's Palace, whereby any Blood ſhall be ſhed, is puniſhable with the Loſs of Hand, perpetual Impriſonment, and Fine at the King's Pleaſure. 3 Inſt. 140. Poph. 206.

Sect. 2. It ſeems queſtionable from the Conſtruction of this whole Act, and the general Tenor of the Law-Books, whether Striking in a Palace, wherein the King is not at the Time actually reſident, be within the Statute; and it is ſaid that the Inſtance which is given in the third Inſtitute, of a Perſon's Hand being cut off for Striking in the Tower, is not warranted by the Record. See the firſt Paragraph of the Act. S. P. C. 38. a. Brò. Pain. 16. Dal. cap. 90. 6 Mod. 75, 76. 3 Inſt. 140.

Sect. 3. However it is certain, That by the Common Law which continues to this Day, Striking in *Weſtminſter-Hall*, where the King is only preſent, as repreſented by his Judges, and by their Adminiſtration diſtributing Juſtice to his People, is more penal than any Striking in another Place in his actual Preſence; for the latter is not puniſhed with the Loſs of Hand, unleſs ſome Blood be drawn, nor even then with the Loſs of Lands or Goods: But if a Perſon draw his Sword on any Judge, in the Preſence of the Court of King's Bench, Chancery, Common Pleas, or Exchequer, or before the Juſtices of Aſſize, or Oyer and Terminer, whether he ſtrike or not, or ſtrike a Juror, or any other Perſon, with or without a Weapon, he ſhall loſe his Hand and his Goods, and the Profits of his Lands during Life, and ſuffer perpetual Impriſonment, [a] if the Indictment lay the Offence as done *coram Domino Rege*. 2 Inſt. 549. 3 Inſt. 140. S. P. C. 38. a. Dal. ch. 90. Cro. El. 405. 41 Aſſ. 25. 22 E. 3. 18. a. Dy. 188. Pl. 10. See B. 2. Ch. 48. Sect. 11. Daliſ. 23. 2 Rol. Ab. 76. Pl. 2. 3.

Sect. 4. [b] Neither can one who is guilty of ſuch Offence excuſe the ſame, by ſhewing that the Perſon ſo ſtruck by him gave the firſt Aſſault. H. P. C. 131, 132. 1 Keb. 751. 12 Co. 71.

Sect. 5. [c] Alſo he who reſcues a Priſoner from any of the Courts abovementioned, without ſtriking a Blow, ſhall forfeit his Goods and the Profits of his Lands, and ſuffer Impriſonment during Life, but not loſe his Hand, becauſe he did not ſtrike.

Sect. 6. [d] And he who makes an Affray in the Palace-Yard near the ſaid Courts, but out of their View, ſhall be impriſoned during the King's Pleaſure, and ſeverely fined, but not loſe his Hand.

Sect. 7. And not only thoſe who are guilty of ſuch an actual Violence, but alſo thoſe who diſturb ſuch Courts by threatening or reproachful Words to any Judge ſitting in them, are guilty of a High Miſpriſion; and in the Time of *Edward* the Firſt, one *William de Bruce*, who, upon hearing Judgment given againſt him in the Exchequer, ſaid to the Chief Baron, *Roger, Roger, Thou haſt had thy Will of me, which of a long Time thou haſt ſought, and I will remember it*, was for theſe Words impriſoned during the King's Pleaſure, and ordered to walk from the King's Bench to the Exchequer, bareheaded and ungirt, and to aſk Forgiveneſs, *&c.* And in the Time of *Charles* the Firſt, one *Harriſon*, for ruſhing into the Court of Common Pleas, and ſaying to Juſtice *Hutton* ſitting there, *I do accuſe Mr. Juſtice* Hutton *of High Treaſon*, was fined five thouſand Pounds, and impriſoned during the King's Pleaſure, and ordered to go to all the Courts of *Weſtminſter-Hall* with a Paper on his Head, ſhewing his Offence, and to make his Submiſſion, *&c.* And theſe Caſes are the more remarkable, becauſe in the firſt, the Offender was of a very honourable Family; and in

[a] Owen 120. Cro. Eliz. 405.
[b] 1 Lev. 106. 6 Mod. 172. Noy 104. Cro. Ja. 367.
[c] 22 E. 3. 13. a. 3 Inſt. 141. con. H. P. C. 131.
[d] Cro. El. 405. Cro. Ca. 373. Sir W. Jon. 345. Owen 120. 3 Inſt. 142. Moor 819. Cro. Ca. 503, 504. Hutt. 131. Poph. 135.

the ſecond, a Bachelor of Divinity, and yet condemned to ſuch corporal Puniſhment, the loweſt of which is in Judgment of Law higher than the greateſt Fine whatever.

Hob. 220. Moore 563. Poph. 135.

Sect. 8. Alſo all who reflect on the Juſtice or Honour of thoſe High Courts ſeem to be indictable and highly finable; as if one charge an Exemplification under the Great Seal to be contrary to the Original.

1 Lev. 107. 1 Keb. 558.

Sect. 9. Alſo he who gives another the Lie in *Weſtminſter-Hall*, ſitting the Courts, ſhall be bound to his Good Behaviour.

3 Inſt. 141. 12 Co. 71.

Sect. 10. And he, who makes an Affray in the Preſence of any of the King's inferior Courts of Juſtice, is highly finable, but not puniſhable with Loſs of Hand, *&c.*

Sect. 11. And he who ſpeaks contemptuous and reproachful Words to the Judge of ſuch a Court in Execution of his Office is [a] immediately finable by ſuch Judge, or, as ſome ſay, may be [b] indicted, *&c.* as [c] if one give the Lie to a Judge of a Court-Leet in the Face of the Court, or being [d] admoniſhed by him to pull of his Hat, ſay, *I do not Value what you can do*, or tell him in the Face of the Court that he is [e] forſworn, or call [f] him Fool, *&c.* or [g] ſay, *If I can not have Juſtice here, I will have it elſewhere.*

[a] Cro. E. 78. 2 R. A. 78. Pl. 4. 6.
[b] 1 Sid. 144. con. 2 Rol. Ab. 78. Pl. 4.
[c] Owen 113. Moore 470. Cro. El. 581.
[d] Raym. 68. 1 Keb. 451, 465.
[e] 2 Rol. Ab. 78. Pl. 4.
[f] Cro. El. 78. Moore 247.
[g] 1 Sid. 144. 1 Keb. 508.

Sect. 12. And it was formerly [h] holden that a Man might be indicted for a Slander of the Juſtice of the Nation, by reflecting on a Sentence given in any Court Eccleſiaſtical or Temporal, whether directly, as where one ſaid that ſuch a Sentence given by the High Commiſſion Court, was againſt Law; or obliquely, as where one ſaid that ſuch a Sentence was juſt, but that the Teſtimonies on which it was founded were falſe, or the *Affidavits* equivocating.

[h] 2 Rol. Ab. 78. Pl. 3. 1 Rol. Re. 245.

Sect. 13. But it ſeems the better Opinion at this Day, That a Man cannot be indicted for any ſcandalous or contemptuous Words ſpoken of or to ſuch Officers, not being in the actual Execution of their Office; for ſuch an Offence ſeems rather to proceed from ill Breeding than a Contempt of the Government; and tho' it may be a Cauſe to bind a Man to his Good Behaviour, yet it does not ſeem to be of ſuch Conſequence as to be a ſufficient Ground for a publick Proſecution, as for an Offence againſt the common Peace, *&c.* And agreeably hereto it hath been reſolved, That a Man ſhall not be indicted for ſaying, [i] *That whenever a Burgeſs of ſuch a Town puts on his Gown, Satan enters into him*; or, [k] *That the Mayor and Aldermen of ſuch a Town are as great Villains as any that rob on the Highway*; or, [l] *That the Juſtices of Peace underſtand no more of the Statutes of Exciſe than this Jug, nor one of twenty of the Parliament-Men who made them*; or [m] *That ſuch a Juſtice of Peace is a Fool, and Aſs, and a Coxcomb, for making ſuch a Warrant, and underſtands no more Law than a Slickhill*; or, [n] *That he is not fit to be a Juſtice of Peace; for that he will do right or wrong, according as his Affections lead him*; or, [o] *That ſuch an Order is a Numſcul Order, and that the Juſtice deſerves to be hanged who made it*; or, [p] *That ſuch a Juſtice of Peace is a forſworn Wretch, and that he will fling his Purſe at him*; or for [q] ſaying to a Mayor of a Town, *You, Mr. Mayor, I do not care a Fart for you*; *You, Mr. Mayor, are a Rogue and a Raſcal*; or, for [r] ſaying, *That the Juſtices of Peace have nothing to do with the Exciſe.*

Hob. 202. Moore 819.
1 Ven. 10.
[i] 1 Mod. 35. 2 Keb. 594.
[k] 5 Mod. 203.
[l] 2 Keb. 494. 5 Mod. 204. 2 Ven. 16.
[m] Queen and Wrightſon. Sal. 696.
[n] Queen and Soley. Sal. 697.
[o] Queen and Legaſley.
[p] Queen and Broxham.
[q] 6 Mod. 124. Salk. 697.
[r] 1 Ven. 10.

Sect. 14. And not only thoſe who diſturb the Adminiſtration of Juſtice by direct Contempts offered to the King's Courts, but alſo all ſuch as are guilty of any injurious Treatment of thoſe Perſons who are under the more immediate Protection of thoſe Courts, are highly puniſhable by Fine and Impriſonment; as if a Man aſſault or threaten his Adverſary for ſuing him, or a Counſellor or Attorney for being imployed againſt him,

3 Inſt. 142. H. P. C. 131. Latch 220.

or a Juror for giving a Verdict againſt him, or a Gaoler for keeping a Priſoner in ſafe Cuſtody. 2 Rol. Ab. 76. D. 2.

Sect. 15. Alſo all who endeavour to ſtifle the Truth, and prevent the due Execution of Juſtice, are highly puniſhable, as thoſe who being examined before the Privy Council concerning their Knowledge of a Crime, whereof a third Perſon is accuſed, diſcloſe what paſſed in ſuch Examination, in order to ſuppreſs a farther Diſcovery; and alſo all thoſe who diſſuade, or but endeavour to diſſuade a Witneſs from giving Evidence againſt a Perſon indicted, *&c.* or who adviſe a Priſoner to ſtand Mute on his Arraignment, *&c.* And it was anciently holden, that if one of the Grand Inqueſt diſcover to any Perſons indicted the Evidence againſt them, he is an Acceſſary to the Offence, whether Treaſon or Felony; and at this Day it is agreed, that he is guilty of a high Miſpriſion, puniſhable by Fine and Impriſonment. Hob. 271. Raym. 376. Trial per Pais 164. H. P. C. 131. 2 Rol. Ab. 77. F. 2. S. P. C. 11. A. 36. B. 27 Aſſ. 63. Bro. Cor. 113. H. P. C. 131. 3 Inſt. 22, 106. See 3 Leon. 207.

CHAP. XXII.

Of Contempts againſt the King's Prerogative.

Sect. 1. CONtempts againſt the King's Prerogative are of ſo various a Nature, that they cannot well be reduced to any certain Heads; however, the Principal of them ſeem to come under the following Particulars:

1. Refuſing to aſſiſt the King for the Good of the Publick.
2. Preferring the Intereſts of a foreign Prince to that of our own.
3. Diſobeying the King's lawful Commands or Prohibitions.

[a] Moore 778. Pl. 1080. Noy 102. [b] S.P.C. 38. A. Fitz. Coro. 161. [c] 2 Rol. Ab. 211. A. 1. [d] 2 Rol. A. 165. X. 166. Bro. Tenure 44, 73. See 1 Ed. 3. ch. 5. 18 Ed. 3. ch. 7. 25 Ed. 3. ch. 8. 4 H. 4. ch. 13. 11 H. 7. ch. 1 & 18. Cro. Ca. 11. Cromp. Juriſd. 83. b. 84. 3 Inſt. 144. Cro. Ca. 153. Cro. Ca. 257. Hob. 235. 12 Co. 94. [e] Sal. 278. Pl. 2. Dy. 176. Pl. 30, 31, 128. Pl. 61, 75. b. Moore 109, 779. Lane 43. 3 Inſt. 179. Savil 7, 8.

Sect. 2. Firſt therefore, It is a high Offence for any Subject to deny the King that Aſſiſtance for the Good of the Publick, either in his Councils or Wars, which by the Law he is bound to give him; as for a Peer not to [a] come to the Parliament at the Day of Summons, or to [b] depart from thence without the King's Licence; or for a [c] Privy Counſellor to refuſe to give his Advice on an Affair of State; or for any [d] private Subject to refuſe to ſerve the King in Perſon, if he be able, or to find another, if he not able, in the Defence of the Realm, againſt Rebels and foreign Invaders; or, as ſome ſay, to refuſe to ſerve the King for Pay in his Wars abroad.

Sect. 3. Secondly, It is ſo high an Offence to prefer the Intereſts of a foreign Prince to that of our own, that it is criminal to do any Thing which may but incline a Man ſo to do; as to receive a Penſion from a foreign Prince without the Leave of our King.

Sect. 4. Thirdly, It is alſo a high Crime to diſobey the King's lawful Commands or Prohibitions; as by obſtinately refuſing Obedience to his Writs; or contemning a Summons from his Council to appear before them; or not anſwering ſuch Queſtions in relation to a Matter wherein the Intereſt of the State is concerned, as ſhall be propoſed by the Privy Council; or refuſing to give Evidence to a Grand Jury concerning a Crime (for which [e] the Court may impoſe an immediate Fine); or not returning from beyond Sea upon the King's Letters to that Purpoſe; for which the Offender's Lands ſhall be ſeized till he return, and when he does

2 Rol. Ab. 208. O. F. N. B. 85. 1 Chan. Caſes 116. 3 Inſt. 178. does return he ſhall be fined) or aſſembling at a Turnament againſt the King's expreſs Prohibition; or going beyond Sea againſt the King's Will expreſly ſignified, either by the Writ, *Ne exeas Regnum*, (which may be directed as well to a Layman as to a Clergyman, and on the Suggeſtion of a private as well as of a publick Matter) or under the Great or Privy Seal or Signet, or by Proclamation.

Cro. Eliz. 655. Book 2. C. 26. Sect. 2. *Sect.* 5. Alſo every Contempt of a Statute is indictable, if no other Puniſhment be limited.

CHAP. XXIII.

Of Contempts againſt the King's Perſon or Government.

Sect. 1. ALL Contempts againſt the King's Perſon or Government are very highly criminal, and puniſhable with Fine and Impriſonment, and ſometimes with the Pillory, by the Diſcretion of the Judges, upon Conſideration of all the Circumſtances of the Caſe; but inaſmuch as it is generally obvious to common Senſe, in what Caſes and to what Degree a Man is guilty of this Offence, and it would be endleſs to enumerate all the Particulars, I ſhall content my ſelf with glancing at ſome of the moſt general Heads; as,

Cro. Ca. 168. 2 Keb. 336. *Sect.* 2. I. The charging the Government with Oppreſſion or weak Adminiſtration; as by ſaying, *That Merchants are ſcrewed up here in* England *more than in* Turkey; or, *That it is a good World when beggarly Prieſts are made Lords*, &c.

5 Mod. 363. *Sect.* 3. II. The doing an Act which impliedly encourages Rebellion; as by abſolving Perſons at the Gallows, who being condemned for High Treaſon, ſhew no Sign of Repentance, but perſiſt in juſtifying the Fact; 3 Mod. 52. or by drinking to the pious Memory of a Perſon executed for High Treaſon.

Cro. Ja. 37. Moore 756. Noy 101. *Sect.* 4. III. Endeavouring to frighten the King into a Change of his Meaſures with Threats of the Uneaſineſs of his Subjects; as by ſubſcribing a Petition to him, in which it is intimated, that if it be denied, many Thouſands will be diſcontented, *&c.*

Cro. Ja. 38. *Sect.* 5. IV. Spreading falſe Rumours concerning the King's Intentions; as that he deſigns to grant a Toleration to Papiſts, *&c.*

Noy 105. *Sect.* 6. V. Charging him with a Breach of his Coronation Oath.

See Cro. Ca. 117, &c. *Sect.* 7. VI. Speaking contemptuouſly of him; as by curſing him, *&c.* or giving out that he wants Wiſdom, Valour or Steadineſs; or in general, doing any Thing which may leſſen him in the Eſteem of his Subjects, and weaken his Government, or raiſe Jealouſies between him and his People.

1 Syd. 143. Pl. 23. *Sect.* 8. Alſo it is ſaid to be an Offence, for which a Man may be indicted, to refuſe in a foreign Port to pay the uſual Cuſtoms, becauſe it may cauſe a Breach between our King and the King of the Country. [19.]

CHAP. XXIV.

Of Contempts againſt the King's Title.

CONTEMPTS againſt the King's Title are of two Kinds,

1. Denying his Title.
2. Refuſing to take the Oaths required by Law for the Support of his Government.

Sect. 1. The firſt Offence of this Kind, *viz.* That of denying the King's Title, hath by ſome been carried ſo high as to be adjudged an Overt-Act of Compaſſing his Death; however, it is certainly moſt highly criminal, and puniſhable with Fine and Impriſonment, and alſo ſuch infamous corporal Puniſhment, as to the Diſcretion of the Court ſhall ſeem proper, according to the Heinouſneſs of the Crime and the Circumſtances of the Parties; as if a Man in Writing or Diſcourſe ſhall maintain that the King is an Uſurper, or that another hath a better Title to the Crown, *&c.* for ſuch like Inſinuations manifeſtly tend to raiſe Tumults and Diſorders in the State, and to alienate the Affections of the People from the Prince, and incline them to favour the Pretenſions of another; and it is highly preſumptuous for private Perſons to intermeddle with Matters of ſo high a Nature; and it will be impoſſible to preſerve the Peace of a Government, unleſs Subjects will quietly ſubmit themſelves to thoſe whom Providence has placed over them, and prefer the publick Good to their own private Inclinations and Opinions: For otherwiſe, whenever the Title to the Crown ſhall happen to be conteſted, it will be impoſſible to end the Difference without perpetual Civil Broils and Diſſenſions, and the Prince who prevails will be tempted to eſteem thoſe of the contrary Party rather as Enemies than ſubjects, If he finds them ready and deſirous to lay hold of all Opportunities to diſturb his Government, and ſhake off their forced Obedience. And ſince there is no Tribunal but that of Heaven, to which Princes can appeal for the Deciſion of their Titles, when that ſeems ſo far to have declared in Favour of one as to give him quiet Poſſeſſion of the Throne, the publick Peace, which is the End of all Government, requires a dutiful Submiſſion to him; and it is the higheſt Madneſs to give up that Eaſe and Security which we may enjoy from a peaceful Obedience, in Exchange for that Diſorder, Uncertainty, and Bloodſhed, which cannot but be expected from an Attempt to wreſt the Sceptre out of the Hands of our Prince; and it is the higheſt Ingratitude to make no other Return but Diſloyalty and Rebellion, for all the Happineſs we can enjoy under a juſt Adminiſtration; and it is the greateſt of Abſurdities to think that the Good of the Community, for the ſake of which all Government was inſtituted, ought not to be preferred before the diſputed Title of a particular Perſon or Family: All we can deſire from Government, is the ſecure Enjoyment of what we may call our own, and whether this, or that Competitor to the Crown be the Inſtrument of this Happineſs to us, ſeems little to concern us. Let the Title of one out of Poſſeſſion of the Throne be never ſo plauſible, it muſt have

Yelv. 107. 2 Rol. Re. 90. Palm. 424.

its original Foundation from ſome poſitive Law; which, when it cannot take Effect without involving a Nation in Diſcord and Confuſion, the avoiding whereof is the very End of all Laws, it muſt give way to the publick Neceſſity of the State; for there can be no human Inſtitution whatſoever, but muſt be limited by this implicit Reſerve from the firſt Principles of Reaſon, that where-ever the Execution of it ſhall be abſolutely inconſiſtent with the Happineſs of the People for whoſe ſake it was ordained, it ought ſo far to be ſuſpended.

Sect. 2. For this and many other ſuch like Reaſons, the Law has always had a moſt tender Regard for the Security of the Prince in Poſſeſſion of the Crown, and as it has made it High Treaſon to compaſs his Death, *&c.* as appears from Chap. 17. Sect. 11, *&c.* ſo hath it alſo made it highly Penal in any inferiour Degree to diſturb or diſquiet his Government.

As to the ſecond Kind of Offences of this Nature, *viz.* That of refuſing to take the Oaths required by Law for the Support of the King's Government; I ſhall conſider,

1. The Offence of refuſing the Oaths required for this Purpoſe by the Common Law.

2. The Offence of refuſing the Oaths required by Statute.

Finch of Law 241, 242.

Sect. 3. As to the firſt Particular, it ſeems to be a high Contempt at the Common Law to refuſe to take the Oath of Allegiance to the King, which all Laymen above the Age of twelve Years are bound to take at the Torn or Court-Leet, *&c.* and ſurely nothing can be more unreaſonable than to deny the King, whoſe Government we are happy under, all proper Aſſurances of our Fidelity to him; for how can we expect to enjoy the Privileges of Subjects from one to whom we refuſe to acknowledge our ſelves Subjects, or hope for Protection from one, whom we provoke to eſteem us as his Enemies, or blame that Government for treating us as Malecontents, to which we give ſo juſt a Cauſe to ſuſpect our Fidelity? If we conſult the Law of God, that will tell us, *That the Powers that be are ordained of God*; If we will hear the Voice of Reaſon, that will convince us, that not only the Peace and Safety of the Community, but alſo our own Preſervation requires us to pay a dutiful Obedience to thoſe who govern us; and can we think it unlawful to engage our ſelves to do what it is our Duty to do? If we will conſult the Practice of all Nations, that will ſhew us, that even Conqueſt, which is the weakeſt of all Titles, has always been eſteemed to give the Conqueror ſuch a Right to the Obedience of the Conquered, that upon his taking them into his Protection, they have in all Ages been ready to promiſe a reciprocal Obedience; and if we will conſult our own Laws, we ſhall find them to direct us to pay our Allegiance to the King who governs us, as has been fully proved in the Chapter of High Treaſon.

As to the ſecond Kind of Offences of this Nature, *viz.* That of refuſing the Oaths required by Statute for the Support of the Government, I ſhall conſider,

1. The Offence of refuſing the Oaths of Allegiance and Supremacy.

2. The Offence of refuſing the Oath of Abjuration.

Sect. 4. As to the firſt of theſe Offences, *viz.* That of refuſing the Oaths of Allegiance and Supremacy, which ſince the Reformation of Religion have been thought neceſſary to be required from all Perſons, eſpecially from thoſe who are intruſted with an Office, in order to ſecure our Princes from the Intrigues of Popes, who have often taken upon them to diſpence with Oaths of Allegiance made to ſuch Princes whom they are pleaſed to call Hereticks, and to perſwade the People that they may law-

fully depoſe thoſe who have ſo far incurred the Diſpleaſure of the Biſhop of *Rome*, as to be excommunicated by him, it having been ſhewn already in Chap. 8. under what Penalties Officers are bound to take the ſaid Oaths and in Chap. 19. Sect. 27, *&c.* how far all Perſons whatſoever are compellable to take them under Pain of incurring a *Præmunire*, I ſhall only take Notice in this Place, of the Method of Proceeding on 1 *Will. & Mar.* 8. by which it is enacted, *That Perſons refuſing the ſaid Oaths being tendered to them by Perſons lawfully authorized to tender the ſame, ſhall be committed by the Perſons making ſuch a Tender for three Months, unleſs they ſhall pay ſuch Sum not exceeding* 40 *s. as the Perſons who ſhall make ſuch Tender ſhall require of them, and if they refuſe again at the End of the three Months, that they ſhall be impriſoned ſix Months, or pay a Sum not above ten nor under five Pounds, and alſo find Sureties for their good Behaviour and Appearance at the next Aſſizes, where if they refuſe the ſaid Oaths, they ſhall be incapable of any Office, and continue bound to their good Behaviour, and if they refuſe the Declaration mentioned in* 30 Car. 2. *they ſhall ſuffer as Popiſh Recuſants convict.*

Sect. 5. It ſeems to be the Intention of this Statute, to give the Government an Election to proceed either on the mild Method therein preſcribed, or the more ſevere one appointed by the former Laws, according to the Circumſtances of the Caſe, and Quality of the Offender, *&c.*

Sect. 6. As to the ſecond Offence of this Kind, *viz.* That of refuſing the Oath of Abjuration, the ſame depends on thoſe Laws, which the Nation has been of late under a Neceſſity of eſtabliſhing, by adding a new Limitation to the Law relating to the Succeſſion of the Crown, excluding all Papiſts from a Poſſibility of inheriting it; who, if they be true to their Engagements to their own Religion, cannot but be falſe to thoſe they may make to ours, and can never be expected to execute thoſe Laws, which they cannot but think void, as being repugnant to the Laws of God; or to defend that Faith which they think damnable; or to obſerve thoſe Oaths, which ſeem to them to have been ordained for the Support of Irreligion. And from theſe Conſiderations they have been diſabled from inheriting the Crown, it ſeeming of abſolute Neceſſity in our preſent Circumſtances for the good of the Community, to make ſuch an Alteration in Law, which like all other human Laws depending meerly on the Policy of Men, ſeems to have nothing in it ſo ſacred as to oblige the People unalterably to abide by it to the Hazard of their common Safety, Peace and Happineſs, for the ſake whereof it was at firſt ordained: For ſurely, there cannot be ſo much Danger to the common Good from ſuch an Alteration, as muſt needs follow from the Government of a Prince, whoſe Conſcience is under the Influence of thoſe, who are implacable Enemies to the Religion of his Country, and who thinks himſelf bound by his Duty to God and his Church to promote that Intereſt, which his People think themſelves under the like Obligations to oppoſe: From which unhappy Circumſtances nothing can be expected but endleſs Factions and Diſcords, and irreconcileable Jealouſies and Diſtruſts between Prince and People, which, if they break not into an open Rupture, will at leaſt be attended with ſuch Convulſions and uneaſineſſes, as render a State of Government ſcarce one Degree more ſecure than a State of Anarchy and Confuſion.

Sect. 7. For the remedying of ſuch like Inconveniences, it having been thought proper to exclude all Papiſts from the Crown, it was likewiſe thought expedient to ſecure the preſent Settlement, by obliging all Officers, *&c.* to take the Oath of Abjuration, as to which it is enacted by

by 13 *Will.* 3. c. 6. and 1 *Geor.* 1. St. 2. c. 13. *That all Perſons who ſhall be admitted,* &c. *into any Office Civil or Military, (not being an Office of Inheritance, executed by a lawful Deputy) or ſhall receive any Pay, Salary, Fee or Wages, by Reaſon of any Patent or Grant from the King, or that have a Command or Place of Truſt under the King,* &c. *or ſhall be admitted into any Service or Imployment in the King's Houſhold or Family, or of his Royal Highneſs* George *Prince of* Wales, *or her Royal Highneſs the Princeſs of* Wales, *or their Iſſue, and all Eccleſiaſtical Perſons, Heads or Governors, of what Denomination ſoever, and all other Members of Colleges and Halls in any Univerſity, that ſhall be of the Foundation, or enjoy any Exhibition, being of, or as ſoon as they ſhall attain the Age of eighteen Years, and all Perſons teaching or reading to Pupils in any Univerſity or elſewhere, and all School-maſters and Uſhers, and all Preachers and Teachers of ſeparate Congregations, High or Chief Conſtables, and every Perſon who ſhall act as Serjeant at Law, Counſellor at Law, Barraſter, Advocate, Attorney, Solicitor, Proctor, Clerk, or Notary, by practiſing in any Manner as ſuch, in any Court or Courts whatſoever within that Part of* Great Britain *called* England, *ſhall within three Months after they ſhall be admitted into, or enter upon any ſuch Preferment, Benefice, Office, or Place, or come into ſuch Capacity, or take upon them ſuch Practice, Imployment or Buſineſs, take and ſubſcribe the Oaths of Allegiance, Supremacy and Abjuration, at one of the Courts at* Weſtminſter, *or at the General Quarter-Seſſions of the Peace where they ſhall reſide, or otherwiſe they ſhall be* ipſo facto *adjudged incapable, and diſabled in Law, to have, occupy, or enjoy the ſaid Offices,* &c. *and if they ſhall by themſelves, or Deputy or Truſtee, execute any the ſaid Offices,* &c. *and ſhall be thereof convict,* &c. *they ſhall be diſabled to proſecute any Suit at Law or Equity, or to be Guardians, Executors, or Adminiſtrators, or capable of any Legacy or Deed of Gift, or to be in any Office within this Realm, or to vote at any Election for Members of Parliament, and ſhall forfeit five hundred Pounds,* &c.

Sect. 8. And it is farther enacted by the ſaid Statute, *That any two Juſtices of the Peace, or any other Perſon or Perſons who ſhall be by the King for that Purpoſe ſpecially appointed by Order in the Privy Council or by Commiſſion under the Great Seal, may adminiſter and tender the ſaid Oaths to any Perſon whatſoever, whom they ſhall ſuſpect to be dangerous or diſaffected; and that if any Perſon, to whom the ſaid Oaths ſhall be ſo tendered, ſhall neglect or refuſe to take the ſame; or if any Perſon being ſummoned by the ſaid Juſtices,* &c. *in order to take the ſaid Oaths either in proper Perſon, or by Notice left at his Place of Abode with one of the Family, ſhall neglect or refuſe to appear,* &c. *ſuch Refuſal ſhall be certified at Seſſions,* &c. *and from thence to the King's Bench or Chancery,* &c. *and every ſuch Perſon ſo neglecting to take the ſaid Oaths, ſhall be adjudged a Popiſh Recuſant convict,* &c.

Sect. 9. And it is farther enacted by the ſaid Statute, *That if any Member of either Univerſity ſhall neglect to take and ſubſcribe the ſaid Oaths according to the Intent of the ſaid Act, or to produce a Certificate thereof, under the Hand of ſome proper Officer of the reſpective Court, and cauſe the ſame to be entered in the Regiſter of the proper College or Hall, within one Month after his having taken and ſubſcribed the ſaid Oaths; and if the Perſons in whom the Right of Election of ſuch Member ſhall be, do neglect to elect ſome fitting Perſon in his ſtead within twelve Months,* &c. *that then the King may, under the Great Seal or Sign Manual, nominate ſome fitting Perſon qualified according to the local Statutes of ſuch College,* &c. *and if the Head of any College,* &c. *ſhall neglect to admit ſuch Nominee, by the Space of ten Days after ſuch Admiſſion ſhall be demanded of him, that then the local Viſitor ſhall admit the ſaid Nominee; and if ſuch Viſitor ſhall neglect or refuſe to admit ſuch Perſon within the Space of one Month after the ſame ſhall be demanded, that then the Court of King's*

Bench may iſſue a Writ of Mandamus *to ſuch Viſitor to admit ſuch Nominee*, &c.

Sect. 10. And it is farther enacted by the ſaid Statute, *That no Peer ſhall vote or make his Proxy, or ſit in the Houſe of Peers during any Debate, and that no Member of the Houſe of Commons ſhall vote or ſit during any Debate in the ſaid Houſe, after the Speaker is choſen, until he ſhall have taken the ſaid Oaths*, &c. *under Pain of the Diſabilities and Forfeitures above mentioned*, &c.

CHAP. XXV.

Of Felony.

OFfences more immediately againſt the Subject are either Capital or not Capital.

The Capital are either by the Common Law or by Statute.

Sect. 1. Thoſe by the Common Law come generally under the Title of Felony, which, *ex vi Termini*, ſignifies *quodlibet crimen felleo animo perpetratum*, and can be expreſſed by no Periphraſis, or Word equivalent, without the Word *Felonicè*. Vide Spelm. Gloſſ. verb. Felonia. 1 Inſt. 391.

Sect. 2. Felony is ſaid to be included in High Treaſon, and conſequently a Pardon of Felony diſcharges an Indictment of High Treaſon, if it want the Word *Proditorie*. H. P. C. 11. 3 H. 7. 10. a. 3 Inſt. 15.

Sect. 3. It is always accompanied with an evil Intention, and therefore ſhall not be imputed to a meer Miſtake or Miſ-animadverſion, as where Perſons break open a Door, in order to execute a Warrant, which will not juſtify ſuch a Proceeding; *Affectio enim tua nomen imponit operi tuo*; *item crimen non contrahitur niſi nocendi voluntas intercedat*. But the bare Intention to commit a Felony is ſo very criminal, That at the Common Law it was puniſhable as Felony, where it miſſed its Effect thro' ſome Accident no Way leſſening the Guilt of the Offender; but it ſeems agreed at this Day, That Felony ſhall not be imputed to a bare Intention to commit it, yet it is certain that the Party may be very ſeverely fined for ſuch an Intention. Brac. lib. 1. ca. 4. S. P. C. 17. a. 27. b. 1 Lev. 146. 1 Sid. 230, 231. 5 Mod. 206.

CHAP. XXVI.

Of caſual Death and of Deodands.

OF Capital Offences at Common Law more immediately againſt the Subject, there are three principal Kinds:

1. Such as are committed againſt his Life.
2. Such as are againſt his Goods.
3. Such as are againſt his Habitation.

Sect. 1. There is another mix'd Kind of Capital Offences, which conſiſts in the Hindrance of the due Proceſs of publick Juſtice, which I ſhall conſider in the ſecond Book, wherein I ſhall treat of the Means of bringing Offenders to their due Puniſhment.

Bract. lib. 3. cap. 4.

Sect. 2. Offences againſt the Life of a Man come under the general Name of Homicide, which in our Law ſignifies the killing of a Man by a Man.

1 H. H. P. C. 471, 472.

Sect. 3. But before I treat hereof, it may not be improper to conſider the killing of a Man merely *per infortunium*, occaſioned by ſome Animal or Thing without Life, without the Default or Procurement of another Man, as where one is killed by a Fall from a Horſe or Cart, &c. which, though it be not properly Homicide, nor puniſhable as a Crime, yet is taken Notice of by the Law, as far as the Nature of the Thing will bear, in order to raiſe the greater Abhorrence of Murder, and the unhappy Inſtrument or Occaſion of ſuch Death is called a Deodand, and forfeited to the King, in order to be diſpoſed of in pious Uſes by the King's Almoner; as alſo are all ſuch Weapons whereby one Man kills another.

Crom. 31. a. 1 H. H. P. C. 419.

S. P. C. 21. a. 3 Inſt. 58. H. P. C. 34. Pult. 125. a. Dal. cap. 97. 1 H. H. P. C. 422. 2 Keb. 719, 806.

Sect. 4. It ſeems clearly ſettled, That a Horſe, *&c.* killing an Infant within the Age of Diſcretion, are as much forfeited as if he were of Age: But formerly it was holden, That a Horſe or Cart, by a Fall from which an Infant was ſlain, were not forfeited, perhaps for this Reaſon, becauſe the Misfortune might rather ſeem owing to the Indiſcretion of the Infant than any Default in the Horſe, *&c.* But this Diſtinction has not been allowed of late; for the Law does not ground the Forfeiture on any Default in the Things forfeited, ſince it extends it to Things without Life, to which 'tis plain, that no Manner of Fault can be imputed.

S. P. C. 20. b. Pult. 124. b. 1 Sid. 206, 207. 1 Lev. 136. Raym. 97. 6 Mod. 187. 1 Keb. 723, 745.

Sect. 5. Alſo by the Opinion of our ancient Authors, Things fixed to a Freehold, as the Wheel of a Mill, a Bell hanging in a Steeple, *&c.* may be Deodands, but by the latter Reſolutions they cannot, unleſs they were ſevered before the Accident happened.

S. P. C. 21. Pult. 125. a. 3 Inſt. 58. H. P. C. 33. 1 H. H. P. C. 422. Cro. Jac. 483. 2 Rol. Re. 23. Popham 136. Salk. 220.

Sect. 6. However, as it is agreed by all, a Ship in ſalt Water, whether in the open Sea or within the Body of a County, from which a Man falls and is drowned, is not forfeited, becauſe Perſons at Sea are continually expoſed to ſo many Perils, that the Law imputes ſuch Misfortunes happeaing there, rather to them than to the Ship. Alſo it ſeems clear, That when a Man riding on a Horſe over a River is drowned through the Violence of the Stream, the Horſe is not forfeited, becauſe not that, but the Waters cauſed his Death: But it is ſaid, That a Ship by a Fall from which a Man is drowned in the freſh Water ſhall be forfeited, but not the Merchandize therein, becauſe they no way contribute to his Death. And by the ſame Reaſon it ſeems, That if a Man riding on the Shafts of a Waggon fall to the Ground and break his Neck, the Horſes and Waggon only are forfeited, and not the Loading, becauſe it no way contributed to his Death; for which Cauſe, where a Thing not in Motion cauſes a Man's Death, that Part thereof only which is the immediate Cauſe is forfeited. As where one climbing upon the Wheel of a Cart while it ſtands ſtill, falls from it and dies of the Fall, the Wheel only is forfeited: But if he had been killed by a Bruiſe from one of the Wheels being in Motion, the Loading alſo would have been forfeited, becauſe the Weight thereof made the Hurt the greater; and it is a general Rule, That where-ever the Thing which is the Occaſion of a Man's Death is in Motion at the Time, not only that Part thereof, which immediately wounds him, but all Things which move together with it, and

S. P. C. 20. b. 21. 3 Inſt. 58. Pult. 125. See S. P. C. 20. b. & Quære. Pult. 124. b. Salk. 220.

and help to make the Wound more dangerous are forfeited alſo; for the Rule is, *Omnia quæque movent ad Mortem, ſunt Deodanda.* [20.]

Sect. 7. In all theſe Caſes, if the Party wounded die not of his Wound within a Year and a Day after he received it, there ſhall be nothing forfeited, for the Law does not look on ſuch a Wound as the Cauſe of a Man's Death, after which he lives ſo long: But if the Party die within that Time, the Forfeiture ſhall have Relation to the Wound given, and cannot be ſaved by any Alienation or other Act whatſoever in the mean Time.

H. P. C. 55. S. P. C. 21. b. Dalt. ca. 97. Pl. Com. 260. Kellw. 68. b.

Sect. 8. However, nothing can be forfeited as a Deodand, nor ſeized as ſuch, till it be found by the Coroner's Inqueſt to have cauſed a Man's Death; but after ſuch Inquiſition, the Sheriff is anſwerable for the Value of it, and may levy the ſame on the Town where it fell, and therefore the Inqueſt ought to find the Value of it. [21.]

5 Co. 110. b. Co. Li. 115. a. Dal. cap. 97. S. P. C. 21. a. Pult. 125. a. See 4 Ed. 1. de Officio Coronatoris. 1 H. H. P. C. 418, 419.

CHAP. XXVII.

Of Felo de ſe.

HOmicide properly ſo called, is either againſt a Man's own Life, or that of another.

In treating of Homicide againſt a Man's own Life, I ſhall conſider:

1. In what Caſes a Man ſhall be ſaid to be a *Felo de ſe.*
2. What he ſhall forfeit for this Offence.

Sect. 1. As to the firſt Point, I ſhall take it for granted, That in this as well as in all other Felonies, the Offender ought to be of the Age of Diſcretion, and *Compos Mentis*, and therefore that an Infant killing himſelf under the Age of Diſcretion, or a Lunatick during his Lunacy, cannot be a *Felo de ſe.*

1 H. H. P. C. 411, 412. Crom. 30. a. b. 31. a. H. P. C. 28. Dal. cap. 92. 3 Inſt. 54.

Sect. 2. But here I cannot but take Notice of a ſtrange Notion, which has unaccountably prevailed of late, That every one who kills himſelf, muſt be *Non Compos* of Courſe; for it is ſaid to be impoſſible, That a Man in his Senſes ſhould do a Thing ſo contrary to Nature and all Senſe and Reaſon.

3 Mod. 100.

Sect. 3. If this Argument be good, Self-Murder can be no Crime, for a Madman can be guilty of none: But it is wonderful that the Repugnancy to Nature and Reaſon, which is the higheſt Aggravation of this Offence, ſhould be thought to make it impoſſible to be any Crime at all, which cannot but be the neceſſary Conſequence of this Poſition, That none but a Madman can be guilty of it. May it not with as much Reaſon be argued, That the Murder of a Child or of a Parent is againſt Nature and Reaſon, and conſequently that no Man in his Senſes can commit it? But has a Man therefore no Uſe of his Reaſon, becauſe he acts againſt right Reaſon? Why may not the Paſſions of Grief and Diſcontent tempt a Man knowingly to act againſt the Principles of Nature and Reaſon in this Caſe, as thoſe of Love, Hatred and Revenge, and ſuch like, are too well known to do in others?

Sect. 4.

Sect. 4. However our Laws have always had ſuch an Abhorrence of this Crime, that not only he who kills himſelf with a deliberate and direct Purpoſe of ſo doing, but alſo in ſome Caſes he who maliciouſly attempts to kill another, and in Purſuance of ſuch Attempt unwillingly kills himſelf, ſhall be adjudged in the Eye of the Law a *Felo de ſe*; for where-ever Death is cauſed by an Act done with a murdrous Intent, it makes the Offender a Murderer; and therefore if *A.* diſcharge a Gun at *B.* with an Intent to kill him, and the Gun breaks and kills *A.* or if *A.* ſtrike *B.* to the Ground, and then haſtily falling upon him wound himſelf with a Knife which *B.* happens to have in his Hand and die, in both theſe Caſes *A.* is *Felo de ſe*, for he is the only Agent. [22.]

Dal. cap. 92. 44 E. 3. 44. 44 Aſſ. 55. Bro. Cor. 12, 14. Dalt. cap. 92.

Sect. 5. But if *B.* being ſo aſſaulted had been driven to the Wall, and holden up a Pitch-fork or Knife, ſtanding in his Defence, and *A.* had haſtily run upon the ſame and been ſlain, *B.* ſhould be adjudged to kill him in his own Defence. And for the ſame Reaſon perhaps in the Caſe above, if *B.* after he had fallen to the Ground, had holden up a Knife or Sword in his Defence, and *A.* had fallen thereon and been ſlain, *B.* ſhould be adjudged to kill him *ſe defendendo*; for here *B.* exerts his Strength in his own Defence, and by ſo doing occaſions the mortal Wound received by *A.*

S. P. C. 16. a. 20. H.P.C.28,29. Pult. 119. b. Crom. 28. 1 H. H. P. C. 493. Con. 3 Inſt. 54. But the Caſe there is not rightly ſtated, as it is in the Books.

Sect. 6. He, who kills another upon his Deſire or Command, is in the Judgment of the Law as much a Murderer, as if he had done it merely of his own Head, and the Perſon killed is not looked upon as a *Felo de ſe*, inaſmuch as his Aſſent was merely void, as being againſt the Laws of God and Man: But where two Perſons agree to die together, and one of them at the Perſwaſion of the other buys Ratſbane, and mixes it in a Potion, and both drink of it, and he who bought and made the Potion, ſurvives by uſing proper Remedies, and the other dies, perhaps it is the better Opinion, That he who dies ſhall be adjudged a *Felo de ſe*, becauſe all that happened was originally owing to his own wicked Purpoſe, and the other only put it in his Power to execute it in that particular Manner.

Kellw. 136.a. Moore 754. Pl. 1041.

Sect. 7. [a] As to the ſecond Point, *viz.* What ſuch an Offender ſhall forfeit, it ſeems clear that he ſhall forfeit all Chattels Real or Perſonal, which he hath in his own Right, and alſo all ſuch Chattels Real whereof he is poſſeſſed either jointly with his Wife, or in her Right; and alſo all Bonds and other Perſonal Things in Action belonging ſolely to himſelf; and alſo all Perſonal Things in Action, and, as ſome ſay, entire Chattels in Poſſeſſion, to which he was intitled jointly with another, on any Account except that of Merchandize: But it is ſaid, That he ſhall forfeit a Moiety only of ſuch joint Chattels as may be ſevered, and nothing at all of what he was poſſeſſed of as Executor or Adminiſtrator.

[a] S. P. C. 189. F. G. 262, 263. 1 H. H. P. C. 413. H. P. C. 29. Plow. Com. 262, 263. S.P.C. 188. a. Crom. 31. a. 3 Inſt. 55. 19 H. 6. 47. a. 8 E. 4. 24. b. Raym. 7. Plow. Com. 243, 259, 323. b.

Sect. 8. [b] However the Blood of a *Felo de ſe* is not corrupted, nor his Lands of Inheritance forfeited, nor his Wife barred of her Dower.

[b] 1 H.H.P.C. 413. Plow. Com. 261. b. 262.a.

Sect. 9. [c] Alſo no Part of the Perſonal Eſtate is veſted in the King, before the Self-Murder is found by ſome Inquiſition; and conſequently the Forfeiture thereof is ſaved by a Pardon of the Offence before ſuch Finding.

[c] 5 Co. 110.b. 3 Inſt. 54. 1 Saund. 362. 1 H. H. P. C. 414. 1 Sid. 150, 162. 2 Mod. 53. 3 Mod. 100, 241, 242.

Sect. 10. [d] But if there be no ſuch Pardon, the whole is forfeited immediately after ſuch Inquiſition, from the Time ſuch mortal Wound was given, and all intermediate Alienations are avoided.

Sect. 11. [e] And ſuch Inquiſitions ought to be by the Coroner *ſuper viſum Corporis*, if the Body can be found; and an Inquiſition ſo taken, as ſome ſay, cannot be traverſed. [23.]

Con. 1 Lev. 8. 1 Keb. 67, 68. [d] Plow. Com. 260. H. P. C. 29. 5 Co. 110. [e] H. P. C. 29. 3 Inſt. 55. See B. 2. Ch. 9. Sect. 52. 1 H. H. P. C. 414 to 417. Far. 16. Salk. 377. Carth. 72. Skin. 45.

Sect. 12. But if the Body cannot be found, ſo that the Coroner, who has Authority only *ſuper viſum Corporis*, cannot proceed, the Inquiry may be by Juſtices of Peace, (who by their Commiſſion have a general Power to inquire of all Felonies) or in the King's Bench, if the Felony were committed in the County where the ſaid Court ſits; and ſuch Inquiſitions are traverſable by the Executor, *&c.*

3 Inſt. 55. H. P. C. 29. 2 Lev. 141. 1 H. H. P. C. 414.

Sect. 13. Alſo all Inquiſitions of this Offence being in the Nature of Indictments, ought particularly and certainly to ſet forth the Circumſtances of the Fact, as the particular Manner of the Wound, and that it was mortal, *&c.* and in the Concluſion add, That the Party in ſuch manner murdered himſelf.

Sal. 377.

Sect. 14. Therefore if either the Premiſſes be inſufficient, as if it be found that the Party flung himſelf into the Water, *& ſic ſeipſum emergit*, which is Nonſenſe, (becauſe *emergo* ſignifies only to riſe out of the Water) or if there be wanting the proper Concluſion, *& ſic ſeipſum murdravit*, the Inquiſition is not good.

3 Lev. 140. 3 Mod. 100. 2 Lev. 152. contra Salk. 377.

Sect. 15. Yet if it be full in Subſtance, the Coroner may be ſerved with a Rule to amend a Defect in Form.

1 Sid. 225, 259. 3 Mod. 101. 1 Keb. 907. See 1 Saund. 273. for Proceſs from the Crown-Office on ſuch an Inquiſition againſt a Debtor of a Felo de ſe.

CHAP. XXVIII.

Of Juſtifiable Homicide.

HOMICIDE againſt the Life of another either amounts to Felony, or does not.

That which amounts not to Felony, is either juſtifiable and cauſes no Forfeiture at all, or excuſable and cauſes the Forfeiture of the Party's Goods.

And firſt of Juſtifiable Homicide, concerning which I ſhall premiſe theſe general Rules:

Sect. 1. I. It muſt be owing to ſome unavoidable Neceſſity, to which the Perſon who kills another muſt be reduced without any manner of Fault in himſelf.

Vid. Sect. 22.

Sect. 2. II. There muſt be no Malice coloured under Pretence of Neceſſity; for where-ever a Perſon who kills another, acts in Truth upon Malice, and takes Occaſion from the Appearance of Neceſſity to execute his own private Revenge, he is guilty of Murder.

2 Rol. Rep. 120, 121. Kelynge 28. H. P. C. 38. Bract. lib. 3. cap. 4.

Sect. 3. III. According to the Opinion of the old [a] Books, (which in this reſpect ſeem to be contradicted by [b] others more modern) it ſeems, That one may ſet forth a Fact, amounting to juſtifiable Homicide, in a Special Plea to an Indictment or Appeal of Murder; and that the ſame being found true, he ſhall be diſmiſſed, without being arraigned or enforced to plead Not guilty. And indeed it ſeems extreamly hard, That a Sheriff or Judge who condemn or execute a Criminal, *&c.* ſhould be forced on a frivolous Proſecution, to hold up their Hands at the Bar for it, *&c.* But it is agreed, That no one can plead a Fact amounting to Homicide *ſe defendendo*, or by Miſadventure, but that in ſuch a Caſe the Defendant muſt plead Not guilty, and give the Special Matter in Evidence:

21 Ed. 1. de Malefactor' in Parcis. [a] 22 Aſſ. 55. 27 Aſſ. 41. 37 H. 6. 20, 21. a. Bro. Appeal, 5, 129. Bro. Coro. 57, 87, 89. b. [b] 35 H. 6. 11. b. 58. Bro. Appeal. 122.

2 Inſt. 316. 1 Inſt. 283. H. P. C. 38. Bro. Coro. 1.

dence: And it is alſo agreed, That where a Special Fact, amounting to
H. P. C. 38. juſtifiable Homicide, is found by the Jury, the Party is to be diſmiſſed, without being obliged to purchaſe any Pardon, *&c.*

Juſtifiable Homicide is either of a publick or private Nature.

That of a publick Nature, is ſuch as is occaſioned by the due Execution or Advancement of publick Juſtice.

That of a private Nature, is ſuch as happens in the juſt Defence of a Man's Perſon, Houſe, or Goods.

And firſt, I ſhall conſider juſtifiable Homicide in the due Execution of publick Juſtice, as to which the following Rules muſt be obſerved:

Dalt. cap. 98. 1 H. H. P. C. 497. 10 Co. 76. 22 E. 4. 33. a. H. P. C. 35. *Sect.* 4. I. The Judgment, by Virtue whereof any Perſon is put to Death, muſt be given by one who has Juriſdiction in the Cauſe; for otherwiſe both Judge and Officer may be guilty of Felony.

Sect. 5. And therefore if the Court of Common Pleas give Judgment on an Appeal of Death, or Juſtices of Peace on an Indictment of Treaſon and award Execution, which is executed, both the Judges who give, and the Officers who execute the Sentence, are guilty of Felony, becauſe theſe Courts having no more Juriſdiction over theſe Crimes than mere private Perſons, their Proceedings thereon are merely void, and without any Foundation. [24]

H. P. C. 35. Dalt. cap. 98. *Sect.* 6. But if the Juſtices of Peace, on an Indictment of Treſpaſs, arraign a Man of Felony, and condemn him, and he be executed, the Juſtices only are guilty of Felony, and not the Officers who execute their Sentence; for the Juſtices had a Juriſdiction over the Offence, and their Proceedings were irregular and erroneous only, but not void.

[a] 1 Inſt. 128. b. 2 Aſſ. pl. 3. S. P. C. 13. a. 196. 11 H. 4. 12. a. Plow. Com. 306. b. 3 Inſt. 131. [b] 27 Aſſ. 41. 1 H. H. P. C. 501. Bro. Appeal. 69. Coro. 67, 197. *Sect.* 7. II. The Judgment muſt be executed by the lawful Officer.

Sect. 8. [a] Indeed it was formerly holden, That any one might as lawfully kill a Perſon attainted of Treaſon or Felony, as a Wolf or other wild Beaſt; and anciently a Perſon condemned in an Appeal of Death, was delivered to the Relations of the Deceaſed, in order to be executed by them.

Sect. 9. [b] But at this Day, as it ſeems agreed, if the Judge, who gives the Sentence of Death, and, *a fortiori*, if any private Perſon execute the ſame, or if the proper Officer himſelf do it without a lawful Command, they are guilty of Felony.

1 Inſt. 128. b. Dalt. ca. 98. H. P. C. 35. [c] 35 H. 6. 58. b. 1 H. H. P. C. 454, 501. Bro. Appeal. 5. S. P. C. 13. H. P. C. 36, 272. See B. 2. ch. 51. *Sect.* 10. [c] III. The Execution muſt be purſuant of, and warranted by the Judgment, otherwiſe it is without Authority; and conſequently if a Sheriff behead a Man where it is no Part of the Sentence to cut off the Head, he is guilty of Felony.

And now we are come to Juſtifiable Homicide in the due Advancement of publick Juſtice, which I ſhall conſider:

1. In Relation to criminal,
2. In Relation to civil Cauſes.

22 Aſſ. 55. Bro. Cor. 87, 89. S. P. C. 13. 3 Inſt. 221. Dalt. cap. 98. H. P. C. 36. Crom. 30. Fitz. Coro. 192, 258, 261. 1 H. H. P. C. 489. And firſt, Homicide in the Advancement of publick Juſtice in criminal Cauſes may be juſtified in ſeveral Caſes; as,

Sect. 11. I. If a Perſon, having actually committed a Felony, will not ſuffer himſelf to be arreſted, but ſtand on his own Defence, or fly, ſo that he cannot poſſibly be apprehended alive by thoſe who purſue him, whether private Perſons or publick Officers, with or without a Warrant from a Magiſtrate, he may be lawfully ſlain by them.

Sect. 12. II. If an innocent Perſon be indicted of a Felony, where, in Truth, no Felony was committed, and will not ſuffer himſelf to be arreſted by the Officer who has a Warrant to that Purpoſe, he may lawfully be killed by him, if he cannot otherwiſe be taken; for there is a Charge againſt him, upon Record to which at his Peril he is bound to anſwer. [25]

See the Authorities above cited. Fitz. Coro. 179, 261.

Sect. 13. III. If a Criminal, endeavouring to break the Gaol, aſſault his Gaoler, he may be lawfully killed by him in the Affray.

1 H. H. P. C. 481, 496.

Sect. 14. IV. If thoſe who are engaged in a Riot, or a Forcible Entry, or Detainer, ſtand in their Defence, and continue the Force in Oppoſition to the Command of a Juſtice of Peace, *&c.* or reſiſt ſuch Juſtice endeavouring to arreſt them, the Killing of them may be juſtified; and ſo perhaps may the killing of dangerous Rioters by any private Perſons, who cannot otherwiſe ſuppreſs them, or defend themſelves from them, inaſmuch as every private Perſon ſeems to be authorized by the Law to arm himſelf for the Purpoſes aforeſaid.

Crom. 30. b. 158. b. 1 H. H. P. C. 494, 495. H. P. C. 37. See 1 Geo. 1. 5. par. 3. infra Ch. 65. Sect. 56. Poph. 121.

Sect. 15. V. If Treſpaſſers in a Foreſt, Chace, Park, or Warren, or any incloſed Ground wherein Deer are kept, will not render themſelves to the Keepers, upon an Hue and Cry made to ſtand to the King's Peace, but fly from, or defend themſelves againſt them, they may be ſlain by Force of the Statute *de Malefactoribus in Parcis*, and 3 and 4 *Will. & Mar.* 10.

S. P. C. 13. b. Crom. 30. b. Dyer 326. Pl. 3. 1 H. H. P. C. 491.

Sect. 16. VI. If either of the Parties fighting in a Combat allowed by Law, for the Trial of ſome Special Caſes, be ſlain, he who kills him is juſtified, and the Death of the other is imputed to the juſt Judgment of God, who is preſumed to give the Victory to him who fights in Maintenance of the Truth.

Dalt. cap. 98. Plow. Com. 9. b. 3 Inſt. 221. 37 H. 6. 21. a.

Secondly, Homicide in the Advancement of Juſtice in civil Cauſes, may alſo be juſtified in ſome Caſes.

Sect. 17. [a] As where a Sheriff, *&c.* attempting to make a lawful Arreſt in a civil Action, or to retake one who has been arreſted and made his Eſcape, is reſiſted by the Party, and unavoidably kills him in the Affray.

[a] 1 Rol. Re. 189. H. P. C. 37. 3 Inſt. 56. Crom. 24. a.

Sect. 18. [b] And in ſuch Caſe the Officer is not bound to give back, but may ſtand his Ground and attack the Party.

Dalt. cap. 98. [b] H. P. C. 37.

Sect. 19. But no private Perſon of his own Authority can arreſt a Man for a civil Matter, as he may for Felony, *&c.*

Crom. 30. b.

Sect. 20. Neither can the Sheriff himſelf lawfully kill thoſe who barely fly from the Execution of any civil Proceſs.

H. P. C. 37. 1 H. H. P. C. 481.

And now I am to conſider juſtifiable Homicide of a private Nature, in the juſt Defence of a Man's Perſon, Houſe or Goods, in treating whereof I ſhall ſhew,

1. In what Caſes the killing of a Wrong-doer may be juſtified by Reaſon of ſuch Defence.
2. Where the killing of an innocent Perſon may be ſo juſtified.

24 H. 8. c. 5. Dalt. cap. 98. 1 H. H. P. C. 486, 487, 493, 494.

Sect. 21. And firſt the killing of a Wrong-doer, in the making of ſuch Defence, may be juſtified in many Caſes; as where a Man kills one who aſſaults him in the Highway to rob or murder him; or the Owner of a Houſe, or any of his Servants, or Lodgers, *&c.* kill one who attempts to burn it, or to commit in it Murder, Robbery, or other Felony; or a Woman kills one who attempts to raviſh her; or a Servant coming ſuddenly and finding his Maſter robbed and ſlain, falls upon the Murderer immediately and kills him; for he does it in the Height of his Sur-

H. P. C. 32. S. P. C. 14. Bro. Coro. 100, 102. Fitz. Coro. 179, 192, 194, 261, 305. Cro. Ca. 544. 26 Aſſ. 23. Bro. Cor. 100. Crom. 26. b.

Surprize, and under juſt Apprehenſions of the like Attempt upon himſelf: But in other Circumſtances he could not have juſtified the killing of ſuch an one, but ought to have apprehended him, *&c.* [26]

Sect. 22. Neither ſhall a Man in any Caſe juſtify the killing another by a Pretence of Neceſſity, unleſs he were himſelf wholly without Fault in bringing that Neceſſity upon himſelf; for if a Man, in Defence of an Injury done by himſelf, kill any Perſon whatſoever, he is guilty of Manſlaughter at leaſt; as where divers Rioters wrongfully detain a Houſe by Force, and kill thoſe who attack it from without, and endeavour to burn it.

Crom. 27. b. H. P. C. 56.

Sect. 23. Neither can a Man juſtify the killing another in Defence of his Houſe or Goods, or even of his Perſon, from a bare private Treſpaſs; and therefore he that kills another, who claiming a Title to his Houſe, attempts to enter it by Force, and ſhoots at it, or that breaks open his Windows in order to arreſt him, or that perſiſts in breaking his Hedges after he is forbidden, is guilty of Manſlaughter; and he who in his own Defence kills another that aſſaults him in his Houſe in the Day-Time, and plainly appears to intend to beat him only, is guilty of Homicide *ſe defendendo*, for which he forfeits his Goods, but is pardoned of Courſe; yet it ſeems that a private Perſon, and *â fortiori*, an Officer of Juſtice, who happens unavoidably to kill another in endeavouring to defend himſelf from, or ſuppreſs dangerous Rioters, may juſtify the Fact, inaſmuch as he only does his Duty in Aid of the publick Juſtice.

H.P.C.40,57. Cro.Car. 538. Dalt. cap. 98. 1 H. H. P. C. 485, 486, 488.

Pult. 119. a. H. P. C. 40. Crom. 28. a. 3 Inſt. 138. Poph. 121.

Sect. 24. And I can ſee no Reaſon why a Perſon, who without Provocation is aſſaulted by another in any Place whatſoever, in ſuch a Manner as plainly ſhews an Intent to murder him, as by diſcharging a Piſtol, or puſhing at him with a drawn Sword, *&c.* may not juſtify killing ſuch an Aſſailant, as much as if he had attempted to rob him: For is not he, who attempts to murder me, more injurious than he who barely attempts to rob me? And can it be more juſtifiable to fight for my Goods, than for my Life? And it is not only highly agreeable to Reaſon, that a Man in ſuch Circumſtances may lawfully kill another, but it ſeems alſo to be confirmed by the general Tenor of our Law-Books, which ſpeaking of Homicide *ſe defendendo*, ſuppoſe it done in ſome Quarrel or Affray; from whence it ſeems reaſonable to conclude, That where the Law judges a Man guilty of Homicide *ſe defendendo*, there muſt be ſome precedent Quarrel in which both Parties always are, or at leaſt may juſtly be ſuppoſed to have been, in ſome Fault, ſo that the Neceſſity, to which a Man is at length reduced to kill another, is in ſome Meaſure preſumed to have been owing to himſelf: For it cannot be imagined, That the Law, which is founded on the higheſt Reaſon, will adjudge a Man to forfeit all his Goods, and put him to the Neceſſity of purchaſing his Pardon, without ſome Appearance of a Fault. And though it may be ſaid, That there is none in Chance-medley, and yet that the Party's Goods are alſo forfeited by that. I anſwer, That Chance-medley may be intended to proceed from ſome Negligence, or at leaſt want of ſufficient Caution in the Party, who is ſo unfortunate as to commit it, ſo that he doth not ſeem to be altogether faultleſs. Beſides, one of the Reaſons given in our Law-Books for which Homicide *ſe defendendo* forfeits Goods, is becauſe thereby a true Man is killed; but it ſeems abſurd, That he who apparently attempts to murder another, which is the moſt heinous of all Felonies, ſhould be eſteemed ſuch, when thoſe who attempt other Felonies, which ſeem to be much leſs criminal, are allowed to be killed as downright Villains, not deſerving the Protection or Regard of the Law.

N.Bendlo.47. 1 And. 41.

Crom. 27. b. 28. b. Dalt. cap. 98. S. P. C. 15. a. 3 Inſt. 57. Vide Fitz. Coro. 284. 286, 287. Bacon 33.

S. P. C. 15. Dalt. cap. 98.

Sect. 25. However, perhaps in all theſe Caſes, there ought to be a Diſtinction between an Aſſault in the Highway and an Aſſault in a Town; for in the firſt Caſe it is ſaid, That the Perſon aſſaulted may juſtify killing the other without giving back at all: But that in the ſecond Caſe, he ought to retreat as far as he can without apparently hazarding his Life, in reſpect of the Probability of getting Aſſiſtance. N. Bendl. 47. Crom. 27. b. 28. a. Dal. cap. 98. H. P. C. 42.

II. Alſo the killing of an innocent Perſon, in the Defence of a Man's ſelf, is ſaid to be juſtifiable in ſome ſpecial Caſes, as,

Sect. 26. I. If two be ſhipwreck'd together, and one of them get upon a Plank to ſave himſelf, and the other alſo, having no other Means to ſave his Life, get upon the ſame Plank, and finding it not able to ſupport them both, thruſt the other from it, whereby he is drowned, it ſeems that he, who thus preſerves his own Life at the Expence of that of another, may juſtify the Fact by the inevitable Neceſſity of the Caſe. Dal. cap. 98.

Sect. 27. If a Man be awakened in the Night with an Alarm that Thieves are in his Houſe, and ſearching for them in the Dark with his Sword drawn, happen to kill a Perſon lying hid in a Part of the Houſe, who in Truth had no ill Deſign, and was brought thither by a Servant in order to aſſiſt in cleaning the Houſe, it ſeemeth that he may juſtify the Fact, inaſmuch as it hath not the Appearance of a Fault. Cro. Car. 538. March 5. 1 H. H. P. C. 42, 43.

CHAP. XXIX.

Of Excuſable Homicide.

EXcuſable Homicide is either *per infortunium*, or *ſe defendendo*. See 1 H. H. P. C. 38 to 41, 492, 493.

In treating of which I ſhall firſt ſhew the Nature of each of them diſtinctly, and then conſider thoſe Properties wherein they both agree.

Sect. 1. And firſt of Homicide *per infortunium*, or by Miſadventure, which is where a Man in doing a lawful Act, without any Intent of Hurt, unfortunately chances to kill another; as, 3 Inſt. 56. H. P. C. 31. 1 H. H. P. C. 472.

Sect. 2. I. Where a Labourer being at Work with a Hatchet, the Head thereof flies off, and kills one who ſtands by. 6 Ed. 4. 7. b. Bro. Coro. 59, 148.

Sect. 3. II. Where a third Perſon whips a Horſe on which a Man is riding, whereupon he ſprings out, and runs over a Child and kills him, in which Caſe the Rider is guilty of Homicide *per infortunium*; and he who gave the Blow, of Manſlaughter. H. P. C. 58, 59. 1 H. H. P. C. 476.

Sect. 4. III. Where a Workman having firſt given loud Warning to all Perſons to ſtand clear, flings down a Piece of Timber from a private Houſe ſtanding out of the Road, and thereby kills one who happens to be underneath: (But if any Perſon fling down ſuch a Piece of Timber idly in Play, or even a Workman fling it down in the Streets of a Town, where the Danger is apparent in reſpect of the Number of People continually paſſing by, he is guilty of Manſlaughter.) 1 H. H. P. C. 472, 475. Kelynge 40. Bract. lib. 3. cap. 4. Dalt. ca. 96. H. P. C. 31. Bro. Coro. 229.

Sect. 5. IV. Where a Schoolmaſter in correcting his Scholar, or a Father his Son, or a Maſter his Servant, or an Officer in whipping a Criminal condemned to ſuch Puniſhment, happens to occaſion his Death; (yet if ſuch Perſons in their Correction be ſo barbarous, as to exceed all Bounds of Moderation, and thereby cauſe the Party's Death, they are guilty of Manſlaughter at the leaſt; and if they make uſe of 1 H. H. P. C. 454, 473, 474. Bract. lib. 1. ca. 4. H. P. C. 31. Crom. 28. b. Dalt. cap. 96. Kellw. 136.

Skin. 668. Kelynge 65. Vide 5 Mod. 287, 288, &c.

an Inſtrument improper for Correction, and apparently indangering the Party's Life, as an iron Bar, or Sword, *&c.* or kick him to the Ground, and then ſtamp on his Belly and kill him, they are guilty of Murder.)

Kellw. 108. Bro. Cor. 148. Vide Kelynge 41.

Sect. 6. V. Where one lawfully uſing an innocent Diverſion, as ſhooting at Butts, or at a Bird, *&c.* by the glancing of an Arrow, or ſuch like Accident, kills another.

Kellw. 108, 136. Crom. 29. a. 11 H. 7. 23. a.

Sect. 7. VI. Where a Perſon happens to kill another in playing a Match of Foot-ball, Wreſtling, or ſuch like Sports which are attended with no apparent Danger of Life, and intended only for the Trial, Exerciſe and Improvement, of the Strength, Courage, and Activity of the Parties.

[a] 11 H. 7. 23. a. 3 Inſt. 160. See 1 H. H. P. C. 473. Kellw. 108, 136.

Sect. 8. [a] VII. Where one kills another in fighting at Barriers or Tilting by the King's Command, which by the better Opinion, ſecures him from being guilty of Felony, by Reaſon of any ſuch unfortunate Accident.

H. P. C. 31. Dalt. cap. 96. Hob. 134. Cromp. 29. a. Con. Bro. Cor. 22. [b] H. P. C. 31, 32. [c] H. P. C. 58. Con. Hob. 134. Dalt. cap. 98. H. P. C. 57. Aleyn 12. 1 H. H. P. C. 472, 473.

Sect. 9. [b] But if a Perſon kill another by ſhooting at a Deer, *&c.* in a third Perſon's Park, in the doing whereof he is a Treſpaſſer; or by ſhooting off a Gun, or throwing Stones in a City or Highway, or other Place where Men uſually reſort; or [c] by throwing Stones at another wantonly in Play, which is a dangerous Sport, and has not the leaſt Appearance of any good Intent; or by doing any other ſuch idle Action as cannot but indanger the bodily Hurt of ſome one or other; or by tilting or playing at Hand-ſword without the King's Command; or by parrying with naked Swords covered with Buttons at the Points, or with Swords in the Scabbards, or ſuch like raſh Sports, which cannot be uſed without the manifeſt Hazard of Life, he is guilty of Manſlaughter.

H. P. C. 52, 57. Kelynge 117. 1 H. H. P. C. 39.

Sect. 10. And if a Man happen to kill another in the Execution of a malicious and deliberate Purpoſe to do him a perſonal Hurt, by wounding or beating him; or in the wilful Commiſſion of any unlawful Act, which neceſſarily tends to raiſe Tumults and Quarrels, and conſequently cannot but be attended with the Danger of perſonal Hurt to ſome one or other; as by committing a Riot, robbing a Park, *&c.* he ſhall be adjudged guilty of Murder. [27.]

3 Inſt. 56. Kelynge 117. Supra Ch. 27. Sect. 4. H. P. C. 52. 1 H. H. P. C. 475.

Sect. 11. And *a fortiori* he ſhall come under the ſame Conſtruction, who in the Purſuance of a deliberate Intention to commit a Felony, chances to kill a Man, as by ſhooting at tame Fowl, with an Intent to ſteal them, *&c.* for ſuch Perſons are by no Means favoured, and they muſt at their Peril take Care of the Conſequence of their Actions; and it is a general Rule, That where-ever a Man intending to commit one Felony, happens to commit another, he is as much guilty as if he had intended the Felony which he actually commits.

1 H. H. P. C. 476. H. P. C. 32, 44. 3 Inſt. 57. Dal. cap. 93. 11 H. 7. 23. a. Bro. Coro. 229. Dalt. cap. 97.

Sect. 12. Neither ſhall he be adjudged guilty of a leſs Crime, who kills another, in doing ſuch a wilful Act, as ſhews him to be as dangerous as a wild Beaſt, and an Enemy to Mankind in general; as by going deliberately with a Horſe uſed to ſtrike, or diſcharging a Gun, among a Multitude of People, or throwing a great Stone or Piece of Timber from a Houſe into a Street, through which he knows that many are paſſing; and it is no Excuſe that he intended no Harm to any one in particular, or that he meant to do it only for Sport, or to frighten the People, *&c.*

Vide ſupra Ch. 28. Sect. 23, 24. H. P. C. 40, 41. S. P. C. 15.

Sect. 13. And now I am to conſider Homicide *ſe defendendo*, which ſeems to be where one, who has no other poſſible Means of preſerving his Life from one who combats with him on a ſudden Quarrel, or of defending his Perſon from one who attempts to beat him, (eſpecially if ſuch

Attempt be made upon him in his own Houſe,) kills the Perſon by whom he is reduced to ſuch an inevitable Neceſſity.

Sect. 14. And not only he who on an Aſſault retreats to a Wall, or ſome ſuch Streight, beyond which he can go no farther, before he kills the other, is judged by the Law to act upon unavoidable Neceſſity: But alſo he who being aſſaulted in ſuch a Manner, and in ſuch a Place, that he cannot go back without manifeſtly indangering his Life, kills the other without retreating at all. Bro. Coro. 125. 43 Aſſ. 31. 3 Inſt. 56. H. P. C. 41.

Sect. 15. And notwithſtanding a Perſon who retreats from an Aſſault to the Wall, give the other Wounds in his Retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of Homicide *ſe defendendo* only. H. P. C. 41. Crom. 28. S. P. C. 15. a.

Sect. 16. And an Officer who kills one that reſiſts him in the Execution of his Office, and even a private Perſon, that kills one who felonioufly aſſaults him in the Highway, may juſtify the Fact without ever giving back at all. H. P. C. 41. 3 Inſt. 56. Crom. 28. a. Vide ſupra Ch. 28. Sect. 18.

Sect. 17. According to ſome good Opinions, even he who gives another the firſt Blow on a ſudden Quarrel, if he afterwards do what he can to avoid killing him, is not guilty of Felony; yet ſuch a Perſon ſeems to be too much favoured by this Opinion, inaſmuch as the Neceſſity to which he is at laſt reduced, was at the firſt ſo much owing to his own Fault. And it is now agreed, That if a Man ſtrike another upon Malice Prepenſe, and then fly to the Wall, and there kill him in his own Defence, he is guilty of Murder. S. P. C. 15. a. Crom. 28. a. See 1 H. H. P. C. 479, 480. Dalt. cap. 98. Kelynge 58. H. P. C. 42. Dalt. cap. 98.

Sect. 18. Thus far of each kind of excuſable Homicide diſtinctly conſidered, and now I am to conſider thoſe Properties wherein they both agree.

Sect. 19. And firſt it ſeems clear, That neither of theſe Homicides are Felonies, becauſe they are not accompanied with a felonious Intent, which is neceſſary in every Felony. 3 Inſt. 56. 2 Inſt. 149. Fitz. Coro. 116.

Sect. 20. And from hence it ſeems plainly to follow, That they were never puniſhable with Loſs of Life: And the ſame alſo farther appears from the Writ *de Odio & Atia*, by Vertue whereof, if any Perſon committed for killing another, were found guilty of either of theſe Homicides, and no other Crime, he might be bailed; and indeed it ſeems to be againſt natural Juſtice, to condemn a Man to Death, for what is owing rather to his Misfortune than his Fault. 11 H. 4. 93. Pl. 54. Bro. Coro. 80. 15 Aſſ. Pl. 7. Vide infra Sect. 24.

Sect. 21. It is true indeed, That ſome of our beſt Authors have argued from the Statute of *Marlebridge*, ch. 26. which enacts, That *Murdrum de cætero non adjudicetur, ubi Infortunium tantummodo adjudicatum eſt, &c.* that before this Statute Homicides by Miſadventure, or *ſe defendendo*, were adjudged Murder, and conſequently puniſhed by Death. 2 Inſt. 56. S. P. C. 16. C.

Sect. 22. But to this it may be anſwered, That Murder in thoſe Days, ſignified only the private killing of a Man by one, who was neither ſeen nor heard by any Witneſs, for which the Offender, if found, was to be tried by Ordeal, and if he could not be found, the Town in which the Fact was done, was to be amerced ſixty-ſix Marks, unleſs it could be proved that the Perſon killed was an *Engliſhman*, for otherwiſe it was preſumed that he was a *Dane* or *Norman*, who in thoſe Days were often privately made away with by the *Engliſh*. And it being a Doubt whether Homicide by Miſadventure, *&c.* were to be eſteemed Murder in this Senſe, it ſeems to have been the chief Intent of the Makers of this Statute to ſettle this Queſtion. Bract. 134. b. Kelynge 121. See 1 H. H. P. C. 425, 448. Bract. 135. a.

Sect. 23.

H.P.C.98,99. 2 Inſt. 315. Dalt. cap. 98. 1 H. H. P.C. 477.

Sect. 23. II. However it is certain, That notwithſtanding neither of theſe Offences be Felonies, yet a Perſon guilty of them is not bailable by Juſtices of Peace, but muſt be committed till the next coming of the Juſtices of Eyre or Gaol-Delivery.

Regiſt. 133.b. 2Inſt.42,315, 9 Co. 56. 4 Inſt. 182. Bract. 123. Fleta B. 1. Ch. 25. S.P.C. 77. G. 2Inſt.43,315. 9 Co. 56. Co. Bail and Mainprize, c. 10.

Sect. 24. Indeed anciently a Perſon, committed for the Death of a Man might ſue out the Writ *de Odio & Atia*, which by *Magna Charta* 26. is grantable without Fee; and if thereon, by an Inqueſt taken by the Sheriff, he were found to have done the Fact by Miſadventure, or *ſe defendendo*, he might be mainprized by twelve Men, upon the Writ *de ponendo in Ballium*. But ſuch Writs and Enquiries were taken away by the Statute of *Glouceſter*, 9 and 28 *Ed.* 3. 9. And though perhaps they were again revived by 42 *Ed.* 3. 1. which makes all Statutes, contrary to *Magna Charta*, void; yet at this Day they ſeem to be obſolete, and indeed uſeleſs, inaſmuch as the Party may probably be ſooner delivered in the uſual Courſe, by the coming of the Juſtices of Gaol-Delivery.

Vide ſupra Ch.28.Sect.3. 1 H. H. P. C. 478. 4 H. 7. 2. a. Kellw. 53. a. 108. b. 2 Inſt. 316. S. P. C. 15. b. 16. b. Fitz. Coro. 297,354,361. Dalt. cap. 96, 98. F. N. B. 246. C. H.

Sect. 25. III. It is alſo agreed, That no one can excuſe the killing another, by ſetting forth in a ſpecial Plea, that he did it by Miſadventure, or *ſe defendendo*, but that he muſt plead Not guilty, and give the ſpecial Matter in Evidence. And that where-ever a Perſon is found guilty of ſuch Homicide either upon a ſpecial Indictment for the ſame, or by a Verdict ſetting forth the Circumſtances of the Caſe on a general Indictment of Murder or Homicide, he ſhall be diſcharged out of Priſon upon Bail and forfeit his Goods: But that upon removing the Record by *Certiorari* into Chancery, he ſhall have his Pardon of Courſe, without ſtaying for any Warrant from the King to that Purpoſe, as ſhall be more fully ſhewn. *B.* 2. *Ch.* 37. *Sect.* 1.

CHAP. XXX.

Of Manſlaughter.

HOmicide againſt the Life of another, amounting to Felony, is either with or without Malice.

3 Inſt. 55,57. Dalt. cap. 94. H.P.C.56,57. 1 H. H. P. C. 466.

Sect. 1. That which is without Malice is called Manſlaughter, or ſometimes Chance-medly, by which we underſtand ſuch killing as happens either on a ſudden Quarrel, or in the Commiſſion of an unlawful Act, without any deliberate Intention of doing any Miſchief at all.

H. P. C. 217. B. 2. Ch. 29. Sect. 24.

Sect. 2. And from hence it follows, That there can be no Acceſſaries to this Offence before the Fact, becauſe it muſt be done without Premeditation.

Sect. 3. But the Learning relating to this Head, being for the moſt part co-incident with that of others, it will be ſuperfluous to inlarge on it here; and therefore I ſhall refer the Reader to other Chapters for the particular Caſe, as to the following Chapter of Murder, from Section 21 to 32. for thoſe concerning Duelling; and to the ſaid Chapter, Sections 47, 48, 49. and to Chapter 28. Sections 14, 15. for ſuch as happen in a Riot, *&c.* and to Chapter 29 from Section 6 to Section 13. for ſuch as fall out in the Execution of a raſh, unlawful Action.

Sect. 4. But there is a particular kind of Manſlaughter proper to be conſidered here, from which the Benefit of the Clergy is taken away by 1 *Jac.* 1. 8. *Where any Perſon ſhall ſtab or thruſt any Perſon or Perſons that hath not then any Weapon drawn, or that hath not then firſt ſtricken, the Party which ſhall ſo ſtab or thruſt, ſo as the Perſon or Perſons ſo ſtabbed or thruſt, ſhall thereof die within the Space of ſix Months then next following, although it cannot be proved that the ſame was done of Malice fore-thought.* See Skin. 666, 667, 668.

Sect. 5. It is generally holden, That this Statute is but declarative of the Common Law, and in the Conſtruction thereof, the following Points have been reſolved. 1 Bulſt. 87. Kelynge 55.

Sect. 6. I. That where-ever a Perſon who happens to kill another, was ſtruck by him in the Quarrel before he gave the mortal Wound, he is out of the Statute, though he himſelf gave the firſt Blow. 1 Jon. 240. Vide 3 Lev. 266.

Sect. 7. II. That he only who actually gives the Stroke, and not any of thoſe who may be ſaid to do it by Conſtruction of Law, as being preſent, and aiding and abetting the Fact, are within the Statute; from whence it follows, That if it cannot be proved by whom the Stroke was given, none can be found guilty within the Statute. H. P. C. 58. See B. 2. Ch. 33. S. 98. Salk. 542, 543. Aleyn. 44.

Sect. 8. III. That the Killing of a Man with a Hammer, or ſuch like Inſtrument, which cannot come properly under the Words Thruſt, or Stab, is not a Killing within the Statute; but it ſeems that the diſcharging a Piſtol, or throwing a Pot, or other dangerous Weapon at the Party, is within the Equity of the Words, *having a Weapon drawn*; for Penal Statutes are conſtrued ſtrictly againſt the Subject, and favourably and equitably for him. 1 Jones 432. 3 Lev. 266.

Sect. 9. IV. That there is no need to lay the Concluſion of the Indictment *contra forma Statuti*, becauſe the Statute makes no new Offence, but only takes away the Privilege of the Clergy from an old one, and leaves it to the Judgment of the Common Law; from whence it follows, That a Perſon indicted on the Statute, may be found guilty of Manſlaughter generally. Alſo from the ſame Ground it hath been reſolved, That if both an Indictment lay, and a Verdict alſo find, a Fact to be *contra formam Statuti*, which cannot poſſibly be ſo, as that *A.* and *B.* aided and abetted *C. contra formam Statuti*, yet neither ſuch Indictment nor Verdict are void, but *A.* and *B.* ſhall be dealt with in the ſame Manner as they ſhould have been, if thoſe Words *contra formam Statuti* had been wholly omitted, becauſe the Subſtance of the Indictment being found, they may be rejected as Surplus and Senſeleſs: And, *à fortiori*, therefore it is certain, that they ſhall do no Hurt to an Indictment or Verdict containing a Fact which may be within the Statute. H. P. C. 58. See B. 2. Ch. 25. S. 117. H. P. C. 58, 266. Aleyn 47. Cro. Jac. 282.

Sect. 10. V. How far the Words *contra formam Statuti*, ſupply a Defect in an Indictment, which does not ſpecially purſue the Statute, See *B.* 2. *Ch.* 25. *Sect.* 116. See 1 H. H. P. C. 467 to 470.

CHAP. XXXI.

Of Murder.

HOMICIDE againſt the Life of another, amounting to Felony with Malice, is either Murder or Petit Treaſon.

Sect. 1. And firſt of Murder, which antiently ſignified only the private Killing of a Man, for which by Force of a Law introduced by King *Canutus* for the Preſervation of his *Danes*, the Town or Hundred where the Fact was done, was to be amerced to the King, unleſs they could prove that the Perſon ſlain were an *Engliſhman*, (which Proof was called *Engleſchire*) or could produce the Offender, *&c.* And in thoſe Days, the open wilful Killing of a Man through Anger or Malice, *&c.* was not called Murder, but voluntary Homicide.

Bract. 134. b. 135. a. Kelynge 121, &c. 1 H. H. P. C. 447. 448. Bract. 121. a.

Sect. 2. But the ſaid Law concerning *Engleſchire* having been aboliſhed by 14 *Ed.* 3. 4. the Killing of any *Engliſhman* or Foreigner through Malice prepenſe, whether committed openly or ſecretly, was by Degrees called Murder; and 13 *Rich.* 2. 1. which reſtrains the King's Pardon in certain Caſes, does in the Preamble, under the general Name of Murder, include all ſuch Homicide as ſhall not be pardoned without ſpecial Words; and in the Body of the Act expreſſes the ſame by Murder, or Killing by Await, Aſſault, or Malice prepenſed. And doubtleſs the Makers of 23 *H.* 8. *c.* 1. which excluded all wilful Murder of Malice prepenſe from the Benefit of the Clergy, intended to include open, as well as private, Homicide within the Word Murder.

S. P. C. 18. b. 19. a. 1 H. H. P. C. 448.

Sect. 3. By Murder therefore at this Day we underſtand the wilfull Killing of any Subject whatſoever, through Malice fore-thought, whether the Perſon ſlain be an *Engliſhman* or Foreigner.

1 H. H. P. C. 450.

And for the better underſtanding hereof, I ſhall examine the following Particulars:

1. In what Caſes a Man may be ſaid to kill another.
2. In what Places ſuch Killing is within the Cognizance of the Law.
3. Who are ſuch Perſons by killing of whom a Man may commit Murder.
4. What Killing ſhall be adjudged to be Malice prepenſe, or Murder.

Sect. 4. As to the firſt Point, *viz.* In what Caſes a Man may be ſaid to kill another; not only he who by a Wound or Blow, or by Poiſoning, Strangling, or Famiſhing, *&c.* directly cauſes another's Death, but alſo in many Caſes, he who by wilfully and deliberately doing a Thing which apparently endangers another's Life, thereby occaſions his Death, ſhall be adjudged to kill him.

3 Inſt. 48. H. P. C. 53. Palm. 548.

Sect. 5. And ſuch was the Caſe of him who carried his ſick Father, againſt his Will, in a cold froſty Seaſon, from one Town to another, by Reaſon whereof he died. [28]

Crom. 24. b. Pult. 122. a. b. Dalt. cap. 93. 1 H. H. P. C. 431, 432.

Sect. 6. Such alſo was the Caſe of the Harlot, who being delivered of Child, left it in an Orchard covered only with Leaves, in which Condi- n it was ſtruck by a Kite, and died thereof. Crom. 24. b. Dal. cap. 93.

Sect. 7. And in ſome Caſes a Man ſhall be ſaid, in the Judgment of e Law, to kill one who is in Truth actually killed by another, or by mſelf; as where one by Dureſs [a] of Impriſonment compels a Man to ac- ſe an innocent Perſon, who on his Evidence is condemned and executed; where one incites a [b] Madman to kill himſelf or another; or where one ys [c] Poiſon with an Intent to kill one Man, which is afterwards acciden- ly taken by another, who dies thereof. [a] S.P.C.36. c. 3 Inſt. 91. [b] Dal. cap. 93. Supra Ch. 1. S. 7. 1 H. H. P.C. 431, 436, 442, 467. [c] Plow. Com. 474.

Sect. 8. Alſo he who wilfully neglects to prevent a Miſchief, which he ay, and ought to provide againſt, is, as ſome have ſaid, in Judgment of e Law, the actual Cauſe of the Damage which enſues; and therefore if a an have an Ox or Horſe, which he knows to be miſchievous, by being ed to gore or ſtrike at thoſe who come near them, and do not tie them p, but leave them to their Liberty, and they afterwards kill a Man, ac- ording to ſome Opinions, the Owner may be indicted, as having himſelf loniouſly killed him; and this is agreeable to the *Moſaical* Law. How- ver, as it is agreed by all, ſuch a Perſon is certainly guilty of a very groſs Miſdemeanour. [29] 9 Co. 81. 1 H.H.P.C. 430, 431. Fitz. Corone 311. S. P. C. 17. a. Crom. 24. b. Dalt. cap. 93. Pult. 122. b. H. P. C. 53. Exodus c. 21. v. 29.

Sect. 9. Alſo it is agreed, That no Perſon ſhall be adjudged by any Act hatever to kill another, who doth not die thereof within a Year and a ay after; in the Computation whereof, the whole Day on which the Hurt as done ſhall be reckoned the firſt. H. P. C. 55. Pult. 123. a. Dalt. cap. 93. S. P. C. 21. d.

Sect. 10. But if a Perſon hurt by another, die thereof within a Year nd a Day, it is no Excuſe for the other that he might have recovered, f he had not neglected to take Care of himſelf. 3 Inſt. 53. Kelynge 26. 1 Keb. 17.

Sect. 11. As to the ſecond Point, *viz.* In what Places ſuch killing is within the Conuſance of the Law, it ſeems, That the Killing of one who s both wounded and dies out of the Realm, or wounded out of the Realm and dies here, cannot be determined at Common Law, becauſe it annot be tried by a Jury of the Neighbourhood where the Fact was done. But it is agreed, That the Death of one who is both wounded nd dies beyond Sea; and it is ſaid by ſome, That the Death of him who dies here of a Wound given there, may be heard and determined before he Conſtable and Marſhal, according to the Civil Law, if the King pleaſe to appoint a Conſtable. And it ſeemeth alſo to be clear, That ſuch a Fact being examined by the Privy Council, may by Force of 33 *H.* 8. 23. be tried (in Relation to the principal Offenders, but not as to the Acceſſaries) before Commiſſioners appointed by the King in any County in *England*. 3 Inſt. 48. 1 H. H. P.C. 426. 2 Inſt. 51. Co. Lit. 75. S. P. C. 65. a. Bro. Appeal. 153. Cro. Car. 247. B. 2. Ch. 23. S. 12. 3 Keb. 785. Pl. 34. Con. 3 Keb. 715. Pl. 34. 1 And. 195.

Sect. 12. A Murder at Sea was anciently cognizable only by the Civil Law, but now by Force of 27 *H.* 8. 4. and 28 *H.* 8. 15. it may be tried and determined before the King's Commiſſioners in any County of *England* according to the Courſe of the Common Law; yet the Killing of one who dies at Land of a Wound received at Sea, is neither determinable at Common Law, nor by Force of either of theſe Statutes; but it ſeems, that it may be tried by the Conſtable and Marſhal, or before Commiſſioners appointed, in Purſuance of the aforeſaid Statute of 33 *H.* 8. 23. [30] 3 Inſt. 48,49. 1 Leon. 270. H. P. C. 54. 3 Inſt. 48.

Sect. 13. It is ſaid by ſome, That the Death of one who died in one County, of the Wound given in another, was not indictable at all at Common Law, becauſe the Offence was not compleat in either County, and the Jury could enquire only of what happened in their own County. But it hath been holden by others, That if the Corps were carried into the 3 Inſt. 48,49. 1 H. H. P.C. 426, 427. Bro. Coro. 140,141,143. Indictm. 13, 45. S. P. C. 90. c. 6 H. 7. 10. a.

Finch Law, 411. S. P. C. 182. c. 45 Aſſ. Pl. 9. Bro. Appeal, 3, 80, 83, 85, 149.

the County where the Stroke was given, the whole might be enquired of by a Jury of the ſame County: And it is agreed, That an Appeal might be brought in either County, and the Fact tried by a Jury returned jointly from each: And at this Day by Force of 2 and 3 *Ed.* 6. 24. the whole is triable by a Jury of the County wherein the Death ſhall happen, on an Indictment found, or Appeal brought, in the ſame County.

B. 2. Ch. 25. S. 39, 40. Cro. Car. 247. 1 Jon. 255. 1 Lev. 118. Latch 12, 118. 3 Inſt. 50.

Sect. 14. Alſo by Force of 26 *H.* 8. 6. a Murder in *Wales* may be enquired of in an adjoining *Engliſh* County, but Appeals muſt ſtill be brought in the proper County.

Sect. 15. As to the third Point, *viz.* Who are ſuch Perſons by killing of whom a Man may commit Murder; it is agreed, That the malicious Killing of any Perſon, whatſoever Nation or Religion he be of, or of whatſoever Crime attainted, is Murder.

Bract. 121. S. P. C. 21. Bro. Coro. 91. H. P. C. 53. Fitz. Coro. 146, 183, 263. 23 Aſſ. Pl. 94. B. 2. Ch. 29. S. 18. 3 Inſt. 50. 3 Aſſ. 2. Bro. Cor. 68. Dalt. cap. 93. Exodus c. 21. v. 22, 23.

Sect. 16. And it was anciently holden, That the cauſing of an Abortion by giving a Potion to, or ſtriking, a Woman big with Child, was Murder: But at this Day, it is ſaid to be a great Miſpriſion only, and not Murder, unleſs the Child be born alive, and die thereof, in which Caſe it ſeems clearly to be Murder, notwithſtanding ſome Opinions to the contrary. And in this Reſpect alſo, the Common Law ſeems to be agreeable to the *Moſaical*, which as to the Purpoſe is thus expreſſed, *If Men ſtrive and hurt a Woman with Child, ſo that her Fruit depart from her, and yet no Miſchief follow, he ſhall be ſurely puniſhed, according as the Woman's Husband will lay upon him, and he ſhall pay as the Judges determine; And if any Miſchief follow, then thou ſhalt give Life for Life.* [31]

Dyer 186. 1 H. H. P. C. 433. 3 Inſt. 51.

Sect. 17. It ſeems alſo agreed, That where one counſels a Woman to kill her Child when it ſhall be born, who afterwards does kill it in Purſuance of ſuch Advice, he is an Acceſſary to the Murder.

Kelynge 127.

Sect. 18. As to the fourth Point, *viz.* What Killing ſhall be adjudged of Malice prepenſe or Murder; it is to be obſerved, That any formed Deſign of doing Miſchief may be called Malice; and therefore that not ſuch Killing only as proceeds from premeditated Hatred or Revenge againſt the Perſon killed, but alſo in many other Caſes, ſuch as is accompanied with thoſe Circumſtances that ſhew the Heart to be perverſly wicked, is adjudged to be of Malice prepenſe, and conſequently Murder.

Kelynge 130. 1 H. H. P. C. 451 to 454.

Sect. 19. And according to this Notion, I ſhall conſider,

1. Such Murder as is occaſioned through an expreſs Purpoſe to do ſome perſonal Injury to him, who is ſlain in particular, which ſeems to be moſt properly called expreſs Malice.

Kelynge 129, 130. 1 H. H. P. C. 455, &c.

2. Such as happens in the Execution of an unlawful Action, principally intended for ſome other Purpoſe, and not to do a perſonal Injury to him in particular who is ſlain, in which Caſe the Malice ſeems to be moſt properly ſaid to be implied.

Sect. 20. As to Murder in the firſt Senſe, ſuch Acts as ſhew a direct and deliberate Intent to kill another, as Poiſoning, Stabbing, and ſuch like, are ſo clearly Murder, that I know not any Queſtions relating thereto worth explaining: But the Caſes, which have born Diſpute, have generally happened in the following Inſtances;

1. In Duelling.
2. In killing another without any Provocation, or but upon a ſlight one.
3. In killing one whom the Perſon killing intended to hurt in a leſs Degree.

Bulſt. 86, 87.

Sect. 21. As to the firſt Inſtance of this Kind, it ſeems agreed, That where-ever two Perſons in cool Blood meet and fight on a precedent Quarrel,

rel, and one of them is killed, the other is guilty of Murder, and cannot help himſelf by alledging that he was [a] firſt ſtruck by the Deceaſed; or that he had often [b] declined to meet him, and was prevailed upon to do it by his Importunity; or that it was his only Intent to vindicate his Reputation; or that he meant not to kill, but only to diſarm, his Adverſary: For ſince he deliberately ingaged in an Act highly unlawful, in Defiance of the Laws, he muſt at his Peril abide the Conſequences thereof.

[a] 2 Bulſt. 147. Crom. 22. b.
[b] 1 Rol. Rep. 360. 3 Bulſt. 171. H. P. C. 48. 1 H. H. P. C. 452, 453.

Sect. 22. And from hence it clearly follows, That if two Perſons quarrel over Night, and appoint to fight the next Day; or quarrel in the Morning, and agree to fight in the Afternoon; or ſuch a conſiderable Time after, by which, in common Intendment, it muſt be preſumed that the Blood was cooled, and then they meet and fight, and one kill the other, he is guilty of Murder.

3 Inſt. 51. H. P. C. 48. Kelynge 56. 1 Lev. 80.

Sect. 23. And where-ever it appears from the whole Circumſtances of the Caſe, That he who kills another on a ſudden Quarrel, was Maſter of his Temper at the Time, he is guilty of Murder; as if after the Quarrel he fall into other Diſcourſe and talk calmly thereon; or perhaps if he have ſo much Conſideration, as to ſay, That the Place wherein the Quarrel happens is not convenient for Fighting; or that if he ſhould fight at preſent, he ſhould have the Diſadvantage by reaſon of the Height of his Shoes, *&c.*

Kelynge 56. 1 Sid. 177. 1 Lev. 180.

Sect. 24. And if *A.* on a Quarrel with *B.* tell him that he will not ſtrike him, but that he will give *B.* a Pot of Ale to ſtrike him, and thereupon *B.* ſtrike, and *A.* kill him, he is guilty of Murder; for he ſhall not elude the Juſtice of the Law by ſuch a Pretence to cover his Malice.

H. P. C. 48.

Sect. 25. In like Manner if *B.* challenge *A.* and *A.* refuſe to meet him, but in order to evade the Law, tell *B.* that he ſhall go the next Day to ſuch a Town about his Buſineſs, and accordingly *B.* meet him the next Day in the Road to the ſame Town, and aſſault him, whereupon they fight, and *A.* kills *B.* he ſeems guilty of Murder, unleſs it appear by the whole Circumſtances that he gave *B.* ſuch Information accidentally, and not with a Deſign to give him an Opportunity of Fighting.

1 H. H. P. C. 453. Con. Crom. 22. b. and H. P. C. 48.

Sect. 26. And at this Day it ſeems to be ſettled, That if a Man aſſault another with Malice prepenſe, and after be driven by him to the Wall, and kill him there in his own Defence, he is guilty of Murder, in reſpect of his firſt Intent.

Crom. 22. b. Dalt. cap. 93. H. P. C. 47. Kelynge 58, 129.

Sect. 27. And it hath been adjudged, That even upon a ſudden Quarrel, if a Man be ſo far provoked by any bare Words or Geſtures of another, as to make a Puſh at him with a Sword, or to ſtrike at him with any other ſuch Weapon as manifeſtly endangers his Life, before the other's Sword is drawn, and thereupon a Fight enſue, and he who made ſuch Aſſault kill the other, he is guilty of Murder; becauſe that by aſſaulting the other in ſuch an outrageous Manner, without giving him an Opportunity to defend himſelf, he ſhewed that he intended not to fight with him, but to kill him, which violent Revenge is no more excuſed by ſuch a ſlight Provocation, than if there had been none at all.

Crom. 23. a. b. Dalt. cap. 93. Kelyn. 61. and Mawgridge's Caſe.

Sect. 28. But it is ſaid, That if he who draws upon another in a ſudden Quarrel, make no Paſs at him till his Sword is drawn, and then fight with him, and kill him, he is guilty of Manſlaughter only, becauſe that by neglecting the Opportunity of killing the other before he was on

Kelynge 55, 61, 131.

his Guard, and in a Condition to defend himſelf, with like Hazard to both, he ſhew'd that his Intent was not ſo much to kill, as to combat with the other, in Compliance with thoſe common Notions of Honour, which prevailing over Reaſon, during the Time that a Man is under the
2 Rol. Re. 461. Tranſports of a ſudden Paſſion, ſo far mitigate his Offence in Fighting, That it ſhall not be adjudged to be of Malice prepenſe.

H. P. C. 48. 3 Inſt. 51. 1 H. H. P. C. 453. *Sect.* 29. And if two happen to fall out upon a ſudden, and preſently agree to fight, and each of them fetch a Weapon, and go into the Field, and there one kill the other, he is guilty of Manſlaughter only, becauſe he did it in the Heat of Blood.

1 H. H. P. C. 452. Crom. 23. a. Dalt. cap. 93. H. P. C. 49. 1 Rol. Rep. 360. *Sect.* 30. And ſuch an Indulgence is ſhewn to the Frailties of humane Nature, That where two Perſons who have formerly fought on Malice, are afterwards to all Appearance reconciled, and fight again on a freſh Quarrel, it ſhall not be preſumed that they were moved by the old Grudge, unleſs it appear by the whole Circumſtances of the Fact.

3 Bulſt. 171. H. P. C. 51. Dalt. cap. 93. *Sect.* 31. But the Law ſo far abhors all Duelling in cold Blood, That not only the Principal who actually kills the other, but alſo his Seconds are guilty of Murder, whether they fought or not; and ſome have gone ſo far as to hold, That the Seconds of the Perſon killed are alſo equally guilty, in Reſpect of that Countenance which they give to their Principals in the Execution of their Purpoſe, by accompanying them
1 H. H. P. C. 443. therein, and being ready to bear a Part with them: But ſome have
H. P. C. 51. thought this rather too ſevere a Conſtruction to make a Man by ſuch Reaſoning the Murderer of his Friend, to whom he was ſo far from intending any Miſchief, that he was ready to hazard his own Life in his Quarrel.

Kelynge 27. *Sect.* 32. And now I am to conſider the ſecond Inſtance of this kind, *viz.* Such Murder as happens in killing another without any Provocation, or but upon a ſlight one; as to which it is to be obſerved, That wherever it appears that a Man killed another, it ſhall be intended, *prima facie*, that he did it maliciouſly, unleſs de can make out the contrary, by ſhewing that he did it on a ſudden Provocation, *&c.*

[a] Kelynge 135. 1 H. H. P. C. 455, 456. 2 Rol. Rep. 460, 461. [b] Kelynge 131, &c. Dalt. cap. 93. [c] Cro. El. 779. Noy 171. 1 Sid. 277. 1 Lev. 180. Hob. 121. Con. 1 Jon. 432. a. Kelynge 131. *Sect.* 33. Alſo it ſeems to be agreed, That no [a] Breach of a Man's Word or Promiſe, no Treſpaſs either to [b] Lands or Goods, no Affront by bare [c] Words or Geſtures, however falſe or malicious it may be, and aggravated with the moſt provoking Circumſtances, will excuſe him from being guilty of Murder, who is ſo far tranſported thereby, as immediately to attack the Perſon who offends him, in ſuch a Manner as manifeſtly endangers his Life, without giving him Time to put himſelf upon his Guard, if he kills him in Purſuance of ſuch Aſſault, whether the Perſon ſlain did at all fight in his Defence or not; for ſo baſe and cruel a Revenge cannot have too ſevere a Conſtruction.

Kelynge 55, 61, 131. * Kely. 61, 136. Cro. Jac. 296. 12 Co. 87. [d] Kely. 137. 1 Vent. 158, 159. Raym. 212. 2 Keb. 829. [e] Kely. 135. 3 Mod. 68. *Sect.* 34. But if a Perſon ſo provoked, had beaten the other only in ſuch a Manner, that it might plainly appear that he meant not to kill, but only chaſtiſe him; or if he had reſtrained himſelf till the other had put himſelf on his Guard, and then in fighting with him had killed him, he had been guilty of Manſlaughter only.

Sect. 35. * And of the like Offence ſhall he be adjudged guilty, who ſeeing two Perſons fighting together on a private Quarrel, whether ſudden or malicious, takes Part with one of them, and kills the other.

Sect. 36. Neither can he be thought guilty of a greater Crime, who [d] finding a Man in Bed with his Wife, or being actually [e] ſtruck by him, or pulled by the Noſe, or fillipped upon the Forehead, immediately kills him

him; or [a] who happens to kill another in a Contention for the Wall; or [b] in the Defence of his Perſon from an unlawful Arreſt; or [c] in the Defence of his Houſe from thoſe who claiming a Title to it attempt forcibly to enter it, and to that Purpoſe ſhoot at it, *&c.* or in [d] the Defence of his Poſſeſſion of a Room in a Publick Houſe, from thoſe who attempt to turn him out of it, and thereupon draw their Swords upon him; in which Caſe the killing the Aſſailant hath been holden by ſome to be juſtifiable: But it is certain, That it can amount to no more than Manſlaughter.

[a] H. P. C. 57
[b] 3 Inſt. 55. Kelynge 137.
[c] H. P. C. 57 Crom. 27. a. 1 H. H. P. C. 445.
[d] Kelynge 51.

Sect. 37. Nor was he judged criminal in a higher Degree, who ſeeing his Son's Noſe bloody, and being told by him, That he had been beaten by ſuch a Boy, ran three Quarters of a Mile, and having found the Boy, beat him with a ſmall Cudgel, whereof he afterwards died.

H. P. C. 48. Cro. Jac. 296. 12 Co. 87. 1 Vent. 159. 1 H. H. P. C. 453.

Sect. 38. And now we are come to the third Inſtance of this kind, *viz.* Such Murder as happens in killing one whom the Perſon killing intended to hurt in a leſs Degree; as to which it is to be obſerved, That where-ever a Perſon in cool Blood by way of Revenge, unlawfully and deliberately beats another in ſuch a Manner, that he afterwards dies thereof, he is guilty of Murder, however unwilling he might have been to have gone ſo far.

Kelyn. Mawgridge's Caſe, 131. H. P. C. 49, 50, 51, 52.

Sect. 39. Alſo it ſeems, That he, who upon a ſudden Provocation executeth his Revenge in ſuch a cruel Manner, as ſhews a cruel and deliberate Intent to do Miſchief, is guilty of Murder, if Death enſue; as where the Keeper of a Park, finding a Boy ſtealing Wood, tied him to a Horſe's Tail and beat him, whereupon the Horſe ran away and killed him.

Cro. Car. 131. 1 Jon. 198. Palm 545. H. P. C. 49. 1 H. H. P. C. 454.

Sect. 40. And now I am to conſider the ſecond general Branch of this Head, *viz.* In what Caſes ſuch killing ſhall be adjudged Murder which happens in the Execution of an unlawful Action, principally intended for ſome other Purpoſe, and not to do a perſonal Injury to him in particular who happens to be ſlain; and this I ſhall conſider in the following Inſtances:

1. Where the principal Intention is to commit another Felony.
2. Where the principal Deſign is to commit a bare Breach of the Peace, not intended againſt the Perſon of him who happens to be ſlain.
3. Where the chief Motive is to aſſiſt a third Perſon.
4. Where the direct Deſign is to eſcape from an Arreſt.
5. Where the principal Purpoſe is to uſurp an illegal Authority.
6. Where no Miſchief is intended at all.

Sect. 41. As to the firſt Particular, *viz.* Such killing as happens in the Execution of an unlawful Action, whereof the principal Intention was to commit another Felony; it ſeems agreed, That where-ever a Man happens to kill another in the Execution of a deliberate Purpoſe to commit any Felony, he is guilty of Murder; as where a Perſon ſhooting at tame Fowl, with an Intent to ſteal them, accidentally kills a Man; or where one ſets upon a Man to rob him, and kills him in making Reſiſtance; or where a Perſon ſhooting at, or fighting with one Man, with a Deſign to murder him, miſſes him and kills another.

1 H. H. P. C. 465, 474. H. P. C. 50. Kelynge 117. H. P. C. 46, 50. Dalt. cap. 93. Moore 87. Pl. Com. 101.

Sect. 42.

Sect. 42. And not only in ſuch Caſes where the very act of a Perſon, having ſuch a felonious Intent, is the immediate Cauſe of a third Perſon's Death, but alſo where it any Way occaſionally cauſes ſuch a Misfortune,

Pl. Com. 474. 3 Inſt. 51. 1 H. H. P. C. 436, 441, 442, 467. 9 Co. 81.

it makes him guilty of Murder; and ſuch was the Caſe of the Husband, who gave a poiſoned Apple to his Wife, who eat not enough of it to kill her, but innocently, and againſt the Husband's Will and Perſwaſion, gave Part of it to a Child who died thereof; ſuch alſo was the Caſe of the Wife, who mixed Ratsbane in a Potion ſent by an Apothecary to her Huſband, which did not kill him, but afterwards killed the Apothecary, who to vindicate his Reputation taſted it himſelf, having firſt ſtirred it about. Neither is it material in this Caſe, That the ſtirring of the Potion might make the Operation of the Poiſon more forcible than otherwiſe it would have been; for inaſmuch as ſuch a murderous Intention, which of it ſelf perhaps in ſtrictneſs might juſtly be made puniſhable with Death, proves now in the Event the Cauſe of the King's loſing a Subject, it ſhall be as ſeverely puniſhed as if it had had the intended Effect, the miſſing whereof is not owing to any Want of Malice, but of Power.

Pl. Com. 474. 9 Co. 81. b. 1 H. H. P. C. 431.

Sect. 43. But if one happen to be poiſoned by Ratsbane laid in order to deſtroy Vermine, the Perſon by whom he is ſo killed is guilty of Homicide *per infortunium* only, becauſe his Intentions were wholly innocent.

H. P. C. 50.

Sect. 44. Alſo if a third Perſon accidentally happen to be kill'd by one engaged in a Combat with another upon a ſudden Quarrel, it ſeems that

1 H. H. P. C. 441, 446. H. P. C. 45. 3 Inſt. 52. Dalt. cap. 93. Fitz. Coro. 180. Savil 67. Kelynge 66. 22 Aſſ. 71. H. P. C. 50. 4 Co. 40. b. 9 Co. 68. Crom. 25. a. b.

he who kills him is guilty of Manſlaughter only; but it hath been adjudged, That if a Juſtice of Peace, Conſtable or Watchman, or even a private Perſon, be killed in endeavouring to part thoſe whom he ſees fighting, the Perſon by whom he is killed, is guilty of Murder; and that he cannot excuſe himſelf by alledging that what he did was in a ſudden Affray in the Heat of Blood, and through the Violence of Paſſion; for he who carries his Reſentments ſo high, as not only to execute his Revenge againſt thoſe who have affronted him, but even againſt ſuch as have no otherwiſe offended him but by doing their Duty, and endeavouring to reſtrain him from breaking through his, ſhews ſuch an obſtinate Contempt of the Laws, that he is no more to be favoured, than if he had acted in cool Blood.

Kelynge 66.

Sect. 45. Yet it hath been reſolved, That if the third Perſon ſlain in ſuch a ſudden Affray do not give Notice for what Purpoſe he comes, by commanding the Parties in the King's Name to keep the Peace, or otherwiſe manifeſtly ſhewing his Intention to be not to take Part in the Quarrel, but to appeaſe it, he who kills him is guilty of Manſlaughter only, for he might ſuſpect that he came to ſide with his Adverſary.

1 H. H. P. C. 442.

Sect. 46. As to the ſecond Inſtance of this kind, *viz.* Such killing as happens in the Execution of an unlawful Action, where the principal Deſign is to commit a bare Breach of the Peace, not intended againſt the Perſon of him who happens to be ſlain; it ſeems clear, That regularly where

1 H. H. P. C. 442, 443, 463. Savil 67. Moore 86. Palm. 35. Crom. 24. b. 25. a. H. P. C. 47. 5 Mod. 289. Dyer 128. Pl. 60. S. P. C. 17. b.

divers Perſons reſolve generally to reſiſt all Oppoſers in the Commiſſion of any Breach of the Peace, and to execute it in ſuch a Manner as naturally tends to raiſe Tumults and Affrays, as by committing a violent Diſſeiſin with great Numbers of People, hunting in a Park, *&c.* and in ſo doing happen to kill a Man, they are all guilty of Murder; for they muſt at their Peril abide the Event of their Actions, who wilfully engage in ſuch bold Diſturbances of the Publick Peace, in open Oppoſition to, and Defiance of, the Juſtice of the Nation.

Sect. 47. Yet where divers Rioters having forcible Poſſeſſion of a Houſe, afterwards killed a Perſon whom they had ejected, as he was endeavouring in the Night forcibly to regain the Poſſeſſion, and to fire the Houſe, they were adjudged guilty of Manſlaughter only, notwithſtanding they did the Fact in Maintenance of a deliberate Injury, perhaps for this Reaſon, becauſe the Perſon ſlain was ſo much in Fault himſelf. Crom. 28. b. H. P. C. 56. 1 H. H. P. C. 440, 441.

Sect. 48. But if in ſuch, or any other Quarrel, whether it were ſudden or premeditated, a Juſtice of Peace, Conſtable, or Watchman, or even a private Perſon, be ſlain in endeavouring to keep the Peace and ſuppreſs the Affray, he who kills him is guilty of Murder; for notwithſtanding it was not his primary Intention to commit a Felony, yet inaſmuch as he perſiſts in a leſs Offence with ſo much Obſtinacy, as to go on in it to the Hazard of the Lives of thoſe who no otherwiſe offend him, but by doing their Duty in Maintenance of the Law, which therefore affords them its more immediate Protection, he ſeems to be in this Reſpect equally criminal, as if his Intention had been to commit a Felony. H. P. C. 45. Dalt. cap. 93. 3 Inſt. 52. Kelynge 66. 22 Aſſ. 71. 4 Co. 40. b. 9 Co. 68. Crom. 25.

Sect. 49. As to the third Inſtance of this kind, *viz.* ſuch killing, as happens in the Execution of an unlawful Action, the principal Motive whereof was to aſſiſt a third Perſon, it ſeems clear, That if a Maſter maliciouſly intending to kill another take his Servants with him, without acquainting them with his Purpoſe, and meet his Adverſary and fight with him, and the Servants ſeeing their Maſter engaged take part with him, and kill the other, they are guilty of Manſlaughter only, but the Maſter of Murder. 1 H. H. P. C. 437, 446. Pl. Com. 100, 101. a. Crom. 23. Dalt. cap. 93. H. P. C. 51, 52.

Sect. 50. And therefore it follows, *a fortiori*, That if a Man's Servant, or Friend, or even a Stranger, coming ſuddenly, ſee him fighting with another and ſide with him, and kill the other; or ſeeing his Sword broken lend him another, wherewith he kills the other, he is guilty of Manſlaughter only. Crom. 26. b. H. P. C. 57. Dalt. cap. 94. 1 Rol. Rep. 407, 408. 3 Bulſt. 206. H. P. C. 52.

Sect. 51. Yet in this very Caſe if the Perſon killed were a Bailiff, or other Officer of Juſtice, reſiſted by the Maſter, *&c.* in the due Execution of his Duty, ſuch Friend or Servant, *&c.* are guilty of Murder, whether they knew that the Perſon ſlain were an Officer or not. Kelynge 67, 86, 87.

Sect. 52. But perhaps it may be objected, That in this laſt Caſe there ſeems to be no more Malice than in the former; and ſuch third Perſon being wholly ignorant that the Party killed was an Officer, ſeems to be no more in Fault than if he had been a Private Perſon.

Sect. 53. To this it may be anſwered, That all Fighting is highly unlawful, and that he, who on a ſudden ſeeing Perſons engaged in it, is ſo far from endeavouring to part them, as every good Subject ought, that he takes part with one Side, and fights in the Quarrel, without knowing the Cauſe of it, ſhews a high Contempt of the Laws, and a Readineſs to break through them on a ſmall Occaſion, and muſt at his Peril take heed what he does, and conſequently might perhaps in ſtrict Juſtice be adjudged in the foregoing Caſes to act with Malice, which doth not always ſignify a particular ill Will againſt the Perſon killed, as appears by many of the above mentioned Caſes; and though ſuch Perſon be favoured in reſpect of the Suddenneſs of the Occaſion, where both the Quarrel and the Perſons are private, yet he muſt not expect ſuch Indulgence where the Fight, in which he ſo raſhly ingages, was begun in open Oppoſition to the Juſtice of the Nation, and a Perſon happens to be killed thereby who engaged in Maintenance thereof, and on that Account is under its more particular Care; and may juſtly challenge, that his 1 Sid. 160. Noy 50. Plow. Com. 100.

Oppoſers be made Examples to deter others from joining in ſuch unwarrantable Quarrels.

Kelynge 60, 137. Crom. 27. a. Dent's Caſe lately adjudged.

Sect. 54. But if a Man ſeeing another arreſted and reſtrained from his Liberty, under Colour of a Preſs-Warrant or Civil Proceſs, *&c.* by thoſe who in Truth have no ſuch Authority, happen to kill ſuch Treſpaſſers in reſcuing the Perſon oppreſſed, he ſhall be adjudged guilty of Manſlaughter only, notwithſtanding the injured Perſon ſubmitted to them, and endeavoured not to reſcue himſelf, and the Perſon who reſcued him, did not know that he was illegally arreſted; for ſince in the Event it appears, that the Perſons ſlain were Treſpaſſers, covering their Violence with a Shew of Juſtice, he who kills them is indulged by the Law, which in theſe Caſes judges by the Event, which thoſe who engage in ſuch unlawful Actions muſt abide at their Peril.

2 H. H. P. C. 83. Dalt. cap. 93. H. P. C. 45. Crom. 24. a.

Sect. 55. As to the fourth Inſtance of this kind, *viz.* Such Killing as happens in the Execution of an unlawful Action, whereof the direct Deſign was to eſcape from an Arreſt, it ſeems to be agreed, That whoever kills a Sheriff, or any of his Officers, in the lawful Execution of a Civil Proceſs, as on arreſting a Perſon upon a *Capias*, *&c.* is guilty of Murder.

9 Co. 68. Cro. Jac. 280. 1 H. H. P. C. 457, 458, 462. 9 Co. 66. Cro. Jac. 280. B. 2. Ch. 13. S. 28. 2 H. H. P. C. 85

Sect. 56. Neither is it any Excuſe to ſuch a Perſon that the Proceſs was erroneous, (for it is not void by being ſo,) or that the Arreſt was in the Night, or that the Officer did not tell him for what cauſe he arreſted him, and out of what Court, (which is not neceſſary when prevented by the Party's Reſiſtance;) or that the Officer did not ſhew his Warrant, which he is not bound to do at all, if he be a Bailiff commonly known, nor without a Demand, if he be a ſpecial one.

Yet the Killing of an Officer in ſome Caſes will be Manſlaughter only, as,

6 Co. 68. b. 69. a. Cro. Jac. 486 9 Co. 69. [a] Cro Car. 372. 1 H. H. P. C. 457. 1 Jon. 346. 1 Lev. 91. 12 Co. 49. [b] H. P. C. 46.

Sect. 57. I. [a] Where the Warrant by which he acts gives him no Authority to arreſt the Party; as where a Bailiff arreſts *J. S.* a Baronet, who never was knighted, by Force of a Warrant to arreſt *J. S.* Knight.

Sect. 58. II. [b] Where a good Warrant is executed in an unlawful Manner; as if a Bailiff be killed in breaking open a Door or Window to arreſt a Man; or perhaps if he arreſt one on a *Sunday* ſince 29 *Ca.* 2. 7. by which all ſuch Arreſts are made unlawful. [32]

Supra Ch. 28. S. 5. H. P. C. 46.

Sect. 59. As to the fifth Inſtance of this kind, *viz.* Such Killing as happens in the Execution of an unlawful Action, whereof the principal Purpoſe was to uſurp an illegal Authority, it ſeems clear, That if Perſons take upon them to put others to Death, either by Virtue of a new Commiſſion wholly unknown to our Laws, or by Virtue of any known Juriſdiction, which clearly extends not to Caſes of this Nature; as if the Court of Common Pleas cauſe a Man to be executed for Treaſon or Felony; or the Court Martial, in Time of Peace, put a Man to Death by the Martial Law, both the Judges and Officers are guilty of Murder.

Sect. 60. But where Perſons act by Virtue of a Commiſſion, which if it were ſtrictly regular would undoubtedly give them full Authority, but happens to be defective only in ſome Point of Form, it ſeems that they are no way criminal.

Vide ſupra Ch. 29. S. 12.

Sect. 61. As to the ſixth Inſtance of this kind, *viz.* Such Killing as happens in the Execution of an unlawful Action, where no Miſchief was intended at all, it is ſaid, That if a Perſon happen to occaſion the Death of another, in adviſedly doing any idle wanton Action, which cannot but be attended with the manifeſt Danger of ſome other; as by riding with a

Horſe known to be uſed to kick among a Multitude of People, by which he means no more than to divert himſelf by putting them into a Fright, he is guilty of Murder.

Sect. 62. Alſo it hath been anciently holden, That if a Perſon not duly authorized to be a Phyſician or Surgeon, undertake a Cure and the Patient die under his Hand, he is guilty of Felony; but inaſmuch as the Books wherein this Opinion is holden, were written before the Statute of 23 *H.* 8. which firſt excluded ſuch felonious killing, as may be called wilful Murder of Malice prepenſe, from the Benefit of Clergy, it may be well queſtioned, whether ſuch Killing ſhall be ſaid to be of Malice prepenſe, within the Intent of that Statute; however it is certainly highly raſh and preſumptuous for unſkilful Perſons to undertake Matters of this Nature; and indeed the Law cannot be well too ſevere in this Caſe, in order to deter ignorant People from endeavouring to get a Livelihood by ſuch Practiſe, which cannot be followed without the manifeſt Hazard of the Lives of thoſe who have to do with them: But ſurely the charitable Endeavours of thoſe Gentlemen who ſtudy to qualify themſelves to give Advice of this Kind, in order to aſſiſt their poor Neighbours, can by no Means deſerve ſo ſevere a Conſtruction from their happening to fall into ſome Miſtakes in their Preſcriptions, from which the moſt learned and experienced cannot always be ſecure.

8. P. C. 16. b. Pult. 22. b. Crom. 27. 43 Ed. 3. 33. b. Fitz. Coron. 163.

1 H. H. P. C. 429, 430.

See Dal. ch. 93.

For other Particulars relating to this Head, ſee the Chapter of Principals and Acceſſaries, *in the Second Book.*

CHAP. XXXII.

Of Petit Treaſon.

Sect. 1. AT Common Law not only the Offences ſpecified in 25 *Ed.* 3. but many others alſo were eſteemed Petit Treaſons, which are not ſo at this Day; as [a] Piracy by a Subject; [b] Diſcovery of the King's Counſel by one of the Grand Jury; [c] an Attempt by a Wife to kill her Husband, *&c.* But by 25 *Ed.* 3. no Offence ſhall be adjudged Petit Treaſon, except in the following Inſtances:

3 Inſt. 20, 21.

[a] 40 Aſſ. Pl. 35. Infra Ch. 37. S. 2.

[b] 27 Aſſ. 63. 3 Inſt. 22. Dalt. ca. 91.

[c] S. P. C. 10. b. See 1 H. H. P. C. 377 to 382.

1. Where a Servant kills his Maſter.
2. Where a Wife kills her Husband.
3. Where an Eccleſiaſtical Man, ſecular, or religious, kills his Prelate to whom he owes Obedience.

Sect. 2. And this Statute has been ſo ſtrictly conſtrued, that no other Caſe whatſoever, which cannot be brought within the Meaning of theſe Words, however it may be in its own Nature more heinous, ſhall, by Parity of Reaſon, be expounded to be within the Equity of them; and therefore the Murder of a Father by a Son ſhall not be puniſhed as Petit Treaſon, unleſs the Son may by a reaſonable Conſtruction come under the word Servant, ſerving the Father for Meat, Drink, Clothes, or Wages, in which Caſe he ſhall be indicted by the Name of a Servant.

Daliſ. 14. 3 Inſt. 20. H. P. C. 24. Dalt. ca. 91. Crom. 91. b.

Sect. 3.

Bro. Treaſ. 8, 12.

Plow. Com. 86.
19 H. 6. 47. b.
3 Inſt. 20.
4 Co. 46. b.

Sect. 3. Yet the Murder of a Miſtreſs, or of a Maſter's Wife, has been adjudged Petit Treaſon within this Statute, for notwithſtanding the Perſons ſlain can in neither of theſe Caſes in good Grammar, come under the Word Maſter, yet they are clearly within the Meaning thereof, being uſed here to ſignify any Perſon to whom another ſtands related as a Servant.

33 Aſſ. 7.
Bro. Coro. 116.
S. P. C. 10.
Plow. Com. 260. a.
1 Co. 99. b.

Sect. 4. Alſo the Murder of a Perſon by one who was his Servant, upon Malice conceived during the Service, though it be not within the expreſs Words, is within the Meaning of them, inaſmuch as it is but the Execution of the treaſonable Intention of the Party, while he was a Servant.

H. P. C. 24.
S. P. C. 10. N.
3 Inſt. 20.

Sect. 5. Alſo the Procuring, Aiding, or Abetting, of any of theſe Offences, is clearly puniſhable within the Meaning of this Act, in the ſame manner as it was before; for the plain Intent of the Statutes is only to reſtrain the Judges from proceeding againſt other Crimes, as Petit Treaſons, but no way to alter the Law as to theſe.

H. P. C. 24.

Sect. 6. And therefore it ſeems agreed, That Perſons accuſed of Petit Treaſon ſhall be conſtrued to be either not guilty at all, or Principal or Acceſſary, according to the known Rules of Law in other Caſes; and from hence it follows, That if the Fact appear to have been done upon a ſudden Falling out, or in the Party's neceſſary Self-defence, *&c.* it cannot be Petit Treaſon: For inaſmuch as all Petit Treaſon implies Murder, and is the higheſt Degree thereof, where-ever the Circumſtances do not make the Offence Murder, they cannot make it Petit Treaſon; and *vice verſa*, generally where-ever the Circumſtances are ſuch as will make the Killing of a Stranger by a Stranger Murder, they make the Killing of a Husband, or Maſter, *&c.* Petit Treaſon: Yet it hath been adjudged, That if a Wife or Servant procure a Stranger to kill the Husband, or Maſter, in the Abſence of ſuch Wife, or Servant, neither the Procurer nor Actor are guilty of Petit Treaſon, but of Murder only; becauſe it is an allowed Maxim, That the Offence of an Acceſſary can never be of a higher Kind than that of the Principal; but it ſeems clear, That if the Wife or Servant be either actually preſent, when the Crime is done, or preſent only in Judgment of Law, as being in the ſame Houſe, but not in the ſame Room, (in which Caſe the Hopes of their immediate Aſſiſtance encourages and imboldens the Murderer to commit the Fact, which otherwiſe perhaps he would not have dared to do, and makes them guilty in the ſame Degree, as if they had actually ſtood by with their Swords drawn, ready to ſecond the Villany,) ſuch Wife, or Servant, being Principals as much as the Stranger, are guilty of Petit Treaſon, and the Stranger of Murder; but it is ſaid, That if a Wife procure a Servant to kill the Husband, both are guilty of Petit Treaſon: And even if a Stranger procure a Wife, or Servant, to kill the Husband, or Maſter, it ſeems that he may be indicted as Acceſſary to Petit Treaſon.

H. P. C. 24.
Daliſ. 16.
Dalt. ca. 91.
Crom. 19, 20.
Dy. 254. Pl. 103.
Bro. Coro. 119.
40 Aſſ. 25.
H. P. C. 215.
3 Inſt. 20, 21, 139.
Crom. 19. b.
Dy. 128. Pl. 37.
Moor 91. Pl. 227.
Daliſ. 16.
B. 2. Ch. 29. S. 89.
Dy. 332. Pl. 25.
Crompt. 41. Pl. 6.
Daliſ. 16.

CHAP.

CHAP. XXXIII.

Of Simple Larceny.

AND now we are come to Offences againſt the Goods of another, which are generally called Larcenies, from the *Latin* Word *Latrocinium*, of which there are two Kinds:

1. Simple Larceny.
2. Mix'd Larceny.

Simple Larceny is alſo of two Kinds,

1. Grand Larceny.
2. Petit Larceny.

Sect. 1. Simple Grand Larceny is a felonious and fraudulent taking and carrying away, by any Perſon, of the mere Perſonal Goods of another, not from the Perſon, nor out of his Houſe, above the Value of twelve Pence. H. P. C. 60. Dalt. c. 101. 1 H. H. P. C. 503, 504.

For the better Explication of which Definition, I ſhall in order conſider the ſeveral Parts of it; as,

1. What ſhall be ſaid to be a felonious and fraudulent taking.
2. What ſhall be ſaid to be a carrying away.
3. By whom the Offence may be committed.
4. What are ſuch Goods the Taking whereof may be felonious.
5. How far ſuch Goods ought to belong to another.
6. Of what Value they muſt be.

Sect. 2. As to the firſt Particular, *viz.* What ſhall be ſaid to be a felonious and fraudulent Taking, it is to be obſerved, That all Felony includes Treſpaſs, and that every Indictment of Larceny muſt have the Words *Felonicè cepit*, as well as *aſportavit*; from whence it follows, That if the Party be guilty of no Treſpaſs in taking the Goods, he cannot be guilty of Felony in carrying them away. Kelynge 24. Bro. Coro. 45, 48, 58, 137, 160. H. P. C. 61.

Sect. 3. And from this Ground it hath been holden, That one who finds ſuch Goods as I have loſt, and converts them to his own Uſe *Animo furandi*, is no Felon; and, *a fortiori*, therefore it muſt follow, That one who has the actual Poſſeſſion of my Goods by my Delivery, for a ſpecial Purpoſe, as a Carrier who receives them, in order to carry them to a certain Place; or a Taylor who has them in order to make me a Suit of Clothes; or a Friend who is intruſted with them to keep for my Uſe, cannot be ſaid to ſteal them, by imbeziling of them afterwards. 3 Inſt. 103. H. P. C. 61. 1 H. H. P. C. 504, 505, 506. 13 Ed. 4. 9, 10. S. P. C. 25. a. 3 Inſt. 108.

Sect. 4. And herein our Law differs from the Civil, which, agreeably to the *Moſaical* Law, having no capital Puniſhment for bare Thefts, deals with Offences of this Kind as ſuch, as in ſtrict Juſtice moſt certainly it may; but our Law, which puniſhes all Theft with Death, if the Thing ſtoln be above the Value of twelve Pence, and with corporal Puniſhment if under, rather chuſes to deal with them as civil than criminal Offences, perhaps for this Reaſon in the above mentioned Caſe, concerning Goods loſt, becauſe the Party is not much aggrieved where nothing is taken but what he had loſt before; and for this Cauſe in the other Caſes, S. P. C. 25. See Exod. 22.

concerning the imbezilling of Goods delivered to another by the Owner, becauſe the Party being intruſted with the whole Poſſeſſion, it may be preſumed that both the Offender and his Offence are known, and conſequently the Perſon injured is ſuppoſed to have a Remedy by Action againſt him, from which Conſideration ſome have made it Part of the Definition of Larceny, that it be committed without the Knowledge of the Owner; and it ſeems rigorous to have Recourſe to ſevere Laws, where probably more gentle ones will be effectual.

Dalt. ch. 101.

Sect. 5. And agreeably hereto it has been reſolved, That even thoſe who have the Poſſeſſion of Goods by the Delivery of the Party, may be guilty of Felony by taking away Part thereof, with an Intent to ſteal it; as if a Carrier open a Pack and take out Part of the Goods; or a Weaver who has received Silk to work; or a Miller who has Corn to grind; take out Part with an Intent to ſteal it; in which Caſes it may not only be ſaid that ſuch Poſſeſſion of a Part diſtinct from the Whole, was gained by Wrong, and not delivered by the Owner, but alſo that it was obtained baſely, fraudulently, and clandeſtinely, in Hopes to prevent its being diſcovered at all, or fixed upon any one when diſcovered.

1 H. H. P. C. 505.
13 Ed. 4. 9, 10.
S. P. C. 25. a.
Dalt. ca. 102.
Kelynge 35.
1 Rol. Ab. 73. Pl. 16.

Sect. 6. Alſo it ſeems generally agreed, That one who has the bare Charge, or the ſpecial Uſe of Goods, but not the Poſſeſſion of them; as a Shepherd who looks after my Sheep; or a Butler who takes care of my Plate, or a Servant who keeps a Key to my Chamber, or a Gueſt who has a Piece of Plate ſet before him in an Inn, may be guilty of Felony, in fraudulently taking away the ſame; for in all theſe Caſes the Offence may as properly come under the Word *Cepit*; the Injury to the Owner is as great, and the Fraud as ſecret, and the Villany more baſe, than if it had been done by a Stranger.

3 H. 7. 12. b.
21 H. 7. 14. b.
Bro. Coro. 58, 137.
S. P. C. 25. A.
Dalt. ca. 102.
Moore 246.
Poph. 84.
1 H. H. P. C. 505, 506, 667, 668.

Sect. 7. Alſo it ſeems clear, That if a Carrier, after he has brought the Goods to the Place appointed, take them away again ſecretly *animo furandi*, he is guilty of Felony, becauſe the Poſſeſſion which he received from the Owner being determined, his ſecond Taking is in all Reſpects the ſame as if he were a mere Stranger.

H. P. C. 62.
3 Inſt. 107.
Bro. Coro. 160.
S. P. C. 25.
1 H. H. P. C. 505.

Sect. 8. And not only he who firſt lays his Hands on my Goods himſelf, but in many Caſes he who receives them from another, may be guilty of felonioufly taking them; as if a Perſon intending to ſteal my Horſe, take out a Replevin, and thereby have the Horſe delivered to him by the Sheriff; or if one intending to rifle my Goods, get Poſſeſſion from the Sheriff, by Virtue of a Judgment obtained, without any the leaſt Colour of Title, upon falſe Affidavits, *&c.* in which Caſes the making Uſe of legal Proceſs is ſo far from extenuating, that it highly aggravates the Offence, by the Abuſe put on the Law, in making it ſerve the Purpoſes of Oppreſſion and Injuſtice.

1 H. H. P. C. 507.
3 Inſt. 108.
H. P. C. 63.
Kelynge 43.
1 Sid. 254.
Raym. 276.

Sect. 9. Alſo he who ſteals my Goods from *J. S.* who had ſtoln them before, may be indicted, or appealed, as having ſtoln them from me, becauſe in Judgment of Law, the Poſſeſſion as well as Property always continued in me. And for this Cauſe, he who ſteals my Goods in the County of *B.* and carries them to the County of *C.* may be indicted or appealed in the County of *C.* as well as that of *B.* becauſe the Poſſeſſion ſtill continuing in me, every Moment's Continuance of the Treſpaſs is as much a Wrong to it, and may come under the Word *Cepit*, as much as the firſt Taking. Yet a Pirate carrying the Goods whereof he robbed me at Sea, into any County, cannot be indicted for Felony there, becauſe the original Taking was not ſuch a Felony whereof the Common Law takes Conuſance.

13 E. 4. 3. b.
H. P. C. 64, 69, 184.
S. P. C. 61, 182.
Bro. Appeal 84, 100.
Coro. 171.
4 H. 7. 5, 6. a.
1 H. H. P. C. 507.
3 Inſt. 113.

Sect. 10. It ſeems not to have been clearly ſettled before 3 & 4 *Will. & Mar.* 9. whether a Lodger, who ſtole the Furniture of his Lodgings, were indictable as a Felon, inaſmuch as he had a kind of ſpecial Property in the Goods, and was to pay the greater Rent in Conſideration of them; but if it had appeared clearly, from the whole Circumſtances of the Caſe, that the firſt Intention of the Party in coming to the Houſe, was not to have the Conveniency of lodging in it, but only, under the Colour thereof, to have the better Opportunity of rifling it, and to elude the Juſtice of the Law, by endeavouring to keep out of the Letter of it, by gaining a Poſſeſſion of the Goods with the Conſent of the Owner, I cannot ſee any good Reaſon why ſuch a Perſon ſhould not be eſteemed as much a Felon as a mere Stranger, inaſmuch as his whole Deſign was to defraud the Law, and the Conſent of the Owner was grounded on a Suppoſition of his coming as a Lodger, and could never have been gain'd if the Truth had appeared, which the Party ſhall get no Advantage by falſifying: And it brings a Contempt upon the Juſtice of the Nation to ſuffer its Laws to be evaded by ſuch little Contrivances: However this Queſtion is now ſettled by the ſaid Statute, which hath enacted and declared, *That if any Perſon or Perſons ſhall take away with an Intent to ſteal, imbezil or purloin any Chattel, Bedding or Furniture, which by Contract or Agreement he or they are to uſe, or ſhall be let to him or them to uſe, in or with ſuch Lodging, ſuch Taking, Imbezilling, or Purloining, ſhall be to all Intents and Purpoſes taken, reputed, and adjudged to be Larceny and Felony, and the Offender ſhall ſuffer as in Caſe of Felony.* Kelynge 24, 81. Shower 50, 57. 3 & 4 W. & M. c. 9

Sect. 11. It is recited by 21 *H.* 8. 7. *That before the Time of the ſaid Statute, divers, as well Noblemen, as other the King's Subjects, had, upon Confidence and Truſt, delivered unto their Servants their Caſkets, and other Jewels, Money, Goods and Chattels, ſafely to keep, to the Uſe of their ſaid Maſters or Miſtreſſes, and after ſuch Delivery the ſaid Servants had withdrawn themſelves, and gone away from their ſaid Maſters or Miſtreſſes, with the ſaid Caſkets, Jewels, Money, Goods and Chattels, or Part thereof, to the Intent to ſteal the ſame, and defraud their ſaid Maſters or Miſtreſſes thereof, and ſometime being with their ſaid Maſters or Miſtreſſes, had converted the ſaid Jewels, Money, and other Chattels, or Part thereof, to their own Uſe, which Miſbehaviour ſo done, was doubtful in the Common Law, whether it were Felony or not; and by reaſon thereof the aforeſaid Servants had been in great Boldneſs to commit ſuch or the like Offences.* And thereupon it is enacted, *That all and ſingular ſuch Servants, (being of the Age of eighteen Years, and not Apprentices) to whom any ſuch Caſkets, Jewels, Money, Goods or Chattels by his or their ſaid Maſters or Miſtreſſes ſhall from thenceforth ſo be delivered to keep, That if any ſuch Servant or Servants withdraw him or them from their ſaid Maſters or Miſtreſſes, and go away with the ſaid Caſkets, Jewels, Money, Goods or Chattels or any Part thereof, to the Intent to ſteal the ſame, and defraud his or their ſaid Maſters or Miſtreſſes thereof, contrary to the Truſt and Confidence to him or them put, by his or their ſaid Maſters and Miſtreſſes, or elſe being in the Service of his ſaid Maſter or Miſtreſs, without Aſſent or Commandment of his Maſter or Miſtreſs he imbezil the ſame Caſkets, Jewels, Money, Goods or Chattels, or any Part thereof, or otherwiſe convert the ſame to his own Uſe, with like Purpoſe to ſteal it, That if the ſaid Caſkets, Jewels, Money, Goods, or Chattels, that any ſuch Servant ſhall ſo go away with, or which he ſhall imbezil with Purpoſe to ſteal it, as is aforeſaid, be of the Value of* 40 s. *or above, That then the ſame falſe, fraudulent and untrue Act and Demeanour, from thenceforth, ſhall be deemed and adjudged Felony,* &c.

In the Conſtruction of this Statute the following Opinions have been holden. See 1 H.H.P. C. 667, 668.

Sect. 12.

Dal. ca. 102. H. P. C. 63.

Sect. 12. I. That it extends only to ſuch as were Servants to the Owner of the Goods, both at the Time when they were delivered, and alſo at the Time when they were ſtoln.

Dy. 5. Pl. 2, 3. H. P. C. 62, 63. 3 Inſt. 105. Dal. ca. 102.

Sect. 13. II. That it is ſtrictly confined to ſuch Goods as are delivered to keep, and therefore that a Receiver, who having received his Maſter's Rents, runs away with them; or a Servant who being intruſted to ſell Goods, or to receive Money due on a Bond, ſells the Goods, *&c.* and departs with the Money, is not within the Statute; but that a Servant, who receives his Maſter's Goods from another Servant to keep for the Maſter, is as much Guilty as if he had received them from the Maſter's own Hands, becauſe ſuch a Delivery is looked upon as a Delivery by the Maſter.

Dy. 5. Pl. 3.

H. P. C. 63. Dal. ca. 102. Dy. 5.

Sect. 14. III. That it includes not the waſting or conſuming of Goods, howſoever wilful it may be; nor the taking away of an Obligation, or any other bare *Choſe* in Action.

Sect. 15. IV. That it extends not to the Taking of ſuch Things whereof the actual Property is not in the Maſter at the Time; and therefore, That if a Servant having Money, or Corn, *&c.* delivered to him, melt down the Money of his own Head, without the Command of his Maſter, into a Piece of Plate; or turn the Corn into Malt, and then run away with them, that he is not within the Statute, becauſe the Property of theſe Things is ſo far changed, by altering them in ſuch a Manner, that they cannot be known again, and the Maſter cannot afterwards take them without a Treſpaſs; but it is agreed, That if a Servant make a Suit of Clothes of Cloth, or a Pair of Shoes of Leather, delivered to him by the Maſter, and then run away with them, that he is within the Statute, becauſe the Property is no way altered; and even in the firſt Caſe, whether the very Taking of the Plate or Malt, be within the Statute or not; yet I can ſee no Reaſon, why the whole Act of the Servant taken together, ſhould not be looked upon as a Converſion of the Maſter's Goods to his own Uſe, with an Intent to ſteal them, which brings it within the expreſs Letter of the Statute: And it has been reſolved, That a Servant who changes his Maſter's Money from Silver to Gold, and then runs away with it, *&c.* is within the Statute; and I can ſee no good Diſtinction between that and the preſent Caſe.

5 H. 7. 16. a. Crom. 50. Dal. ca. 102.

See Crom. 50. Dal. ca. 102.

Sect. 16. The Benefit of the Clergy was taken away from all Felonies within this Statute, by 27 *H.* 8. 17. and reſtored by 1 *Ed.* 6. 12. but taken away again by 12 *Ann.* 7. from all ſuch as ſhall be committed in a Dwelling-houſe or Out-houſe.

B. 2. ch. 33. Sect. 66, 67.

Sect. 66, 67.

Sect. 17. By 7 *Jac.* 1. 7. *If any Sorter, Kember, Carder or Spinſter of Wool, or Weaver of Yarn made of ſuch Wool, ſhall imbezil any Wool or Yarn delivered to him to be wrought, and ſhall be thereof convict before two Juſtices of Peace, according to the Method preſcribed by that Statute, he ſhall be whipped,* &c.

Sect. 18. As to the ſecond Particular, *viz.* What ſhall be ſaid to be ſuch a Carrying away of the Thing ſtoln, as will bring the Caſe within the Word *Aſportavit*, which is neceſſary in every Indictment of Larceny, it ſeems that any the leaſt removing of the Thing taken from the Place where it was before, is ſufficient for this Purpoſe, tho' it be not quite carried off; and upon this Ground the Gueſt, who, having taken off the Sheets from his Bed, with an Intent to ſteal them, carried them into the Hall, and was apprehended before he could get out of the Houſe, was adjudged guilty of Larceny; ſo alſo was he who having taken a Horſe in a

3 Inſt. 108. 2 Vent. 215. 27 Aſſ. 39. S. P. C. 26. a. Bro. Coro. 107. 3 Inſt. 109. Dal. ca. 102.

Cloſe with an Intent to ſteal him, was apprehended before he could get him out of the Cloſe; neither is he leſs guilty who pulls off the Wool from another's Sheep, or ſtrips their Skins, with an Intent to ſteal them; or he who intending to ſteal Plate takes it out of a Trunk where-in it was, and lays it on the Floor, and is ſurprized before he can carry off. 1 H. H. P. C. 508. Daliſ. 21. Crom. 36. a. Kelynge 31.

Sect. 19. As to the third Particular, *viz.* By whom Larceny may be committed; It is certain that a Feme Covert may be guilty thereof by ſtealing the Goods of a Stranger, but not by ſtealing her Husband's, becauſe Husband and Wife are conſidered but as one Perſon in Law; and the Husband, by endowing his Wife at the Marriage with all his worldly Goods, gives her a kind of Intereſt in them; for which Cauſe, even a Stranger cannot commit Larceny in taking the Goods of the Husband by the Delivery of his Wife; as he may by taking away the Wife by Force and againſt her Will, together with the Goods of the Husband. Sup. Ch. 1. S. 9, 10, 11. 1 H. H. P. C. 514, 515, 516, 637, 638. Pult. 127. H. P. C. 65. Bro. Co. 142. Dal ca. 104. 13 Aſſ. 5. 18 Ed. 3. 32. a. Bro. Coro. 77.

Sect. 20. [a] It is ſaid to be no Felony for one reduced to extream Neceſſity, to take ſo much of another's Victuals as will ſave him from ſtarving; but if ſuch his Neceſſity be owing to his Unthriftineſs, ſurely it is far from being any Excuſe. [33] S. P. C. 94. B. Dal. ca. 104. Crom. 35. [a] Dal. ca. 99. Crom. 33. a. See Proverbs, ch. 6. v. 30.

[b] As to the fourth Point, *viz.* What are ſuch Goods, the ſtealing whereof may amount to Felony, the following Particulars are to be obſerved. [b] 1 H. H. P. C. 509 to 512.

Sect. 21. I. They ought to be no way annexed to the Freehold, and therefore it is no Larceny, but a bare Treſpaſs, to ſteal Corn or Graſs, growing, or Apples on a Tree, or Lead on a Church or Houſe, but it is Larceny to take them being ſevered from the Freehold, whether by the owner, or even by the Thief himſelf, if he ſever them at one Time and then come again at another Time and take them: And the general Reaſon of this Diſtinction between Chattels fix'd to a Freehold and thoſe being looſe, perhaps may be this; becauſe the former, not being to be removed without Trouble and Difficulty, are not ſo liable to be ſtoln, and therefore need not to be ſecured by ſo ſevere Laws as the others require. [34] 12 Aſſ. 32. Bro. Coro. 77. 1 Mod. 89. H. P. C. 66. Allen 83. 2 Keb. 875. Pl. 37. 1 Vent. 187. Crom. 37. a. 18 H. 8. 2. S. P. C. 25. b.

Sect. 22. II. They ought to have ſome Worth in themſelves, and not to derive their whole Value from the Relation they bear to ſome other Thing, which cannot be ſtoln, as Paper or Parchment on which are written Aſſurances concerning Lands, or Obligations, or Covenants, or other Securities for a Debt, or other *Choſe* in Action. And the Reaſon wherefore there can be no Felony in taking away any ſuch Thing ſeems to be, becauſe, generally ſpeaking, they being of no Manner of Uſe to any but the Owner, are not ſuppoſed to be ſo much in danger of being ſtoln, and therefore need not to be provided for in ſo ſtrict a manner as thoſe Things which are of a known Price, and every Body's Money; and for the like Reaſon it is no Felony to take away a Villein, or an Infant in Ward, *&c.* [35] H. P. C. 66, 67. 3 Inſt. 109. Bro. Coro. 155. S. P. C. 25. b. Crom. 27. b. H. P. C. 66. S. P. C. 25. Bro. Coro. 155.

Sect. 23. III. They ought not to be Things of a baſe Nature, as Dogs, Cats, Bears, Foxes, Monkeys, Ferrets, and the like; which, howſoever they may be valued by the owner, ſhall never be ſo highly regarded by the Law, that for their ſakes a Man ſhall die; as he may for ſtealing a Hawk, known by him to be reclaimed, not only by Force of the Statute of 37 *Ed.* 3. 19. but alſo at Common Law, in reſpect of that very high Value which was formerly ſet upon that Bird. H. P. C. 66. 3 Inſt. 109. 7 Co. 18. a. 3 H. 8. 3. b. Crom. 36. a. b. Dalt. ca. 103.

Sect. 24. As to the fifth Point, *viz.* How for the Goods taken away ought to belong to another; it ſeems agreed, That the taking of Goods where- See 1 H. H. P. C. 512 to 515. Bro. Cor. 190.

H. P. C. 67. 22 Aſſ. Pl. 99. 3 Inſt. 108. S. P. C. 25. b. Dalt. ca. 103. Fitz. Cor. 265. 3 Inſt. 109. H. P. C. 67. Owen 20.

whereof no one had a Property at the Time, cannot be Felony; and therefore, That he who takes away Treaſure-trove, or a Wreck, Waif, or Stray, before they have been ſeized by the Perſons who have a Right thereto, is not guilty of Felony, and ſhall be only puniſhed by Fine, *&c.*

Sect. 25. Neither ſhall he who takes a Fiſh in a River or other great Water, wherein they are at their natural Liberty, be guilty of Felony, as he may be who takes them out of a Trunk or Pond, *&c.*

7 Co. 18. 22 Aſſ. 95. 22 H. 6. 59. b. 18 Ed. 4. 8. a. Bro. Coro. 92, 155, 164. S. P. C. 25. b. 3 Inſt. 109, 110. 18 H. 8. 2. a. b. Dalt. ca. 92.

Sect. 26. Upon the like Ground it ſeems clear, That a Man cannot commit Felony by taking Deer, Hares, or Conies, in a Foreſt, Chaſe, or Warren, or old Pigeons being out of the Houſe, *&c.* But it is agreed, That one may commit Larceny in taking ſuch or any other Creatures *feræ naturæ*, if they be fit for Food, and reduced to Tameneſs, and known by him to be ſo; and it ſeems the moſt plauſible Opinion, That it is Felony to ſteal wild Pigeons in a Dove-houſe ſhut up, or Hares or Deer in a Houſe, or even in a Park, incloſed in ſuch a manner that the Owner may take them whenever he pleaſes, without the leaſt Danger of their eſcaping, in which Caſe they are as much in his Power as Fiſh in a Pond, or young Pigeons, or Hawks in a Neſt, *&c.* in taking of which, for the like Reaſon, it ſeems to be agreed, that Felony may be committed.

H. P. C. 68. 1 H. H. P. C. 511. 7 Co. 17, 18. Dalt. ca. 103. H. P. C. 68. 3 Inſt. 109. ſeem contrary. H. P. C. 68. 3 Inſt. 109.

Sect. 27. Alſo it ſeems clear, That one may commit Felony by taking away Swans marked or pinioned, or thoſe which are unmarked, if they be kept in a Pond or private River; neither do I ſee why it is not as much Felony to ſteal the Eggs of ſuch Swans or Hawks, as it is to ſteal their young Ones, unleſs it be becauſe 11 *H.* 7. 17. has appointed a leſs Puniſhment for this Offence. [36]

Sect. 28. However, there is no Doubt but that the Taking of Domeſtick Beaſts, as Horſes, Mares, Colts, *&c.* or of any Creatures whatſoever, which are *domitæ Naturæ*, and fit for Food, as Ducks, Hens, Geeſe, Turkeys, Peacocks, or their Eggs, or young Ones, may be Felony.

S. P. C. 25, 96. A. Dy. 99. Pl. 61. Dal. ca. 103. H. P. C. 67. B. 2. Ch. 23. S. 78. 7 Ed. 4. 14. b. 15. a. S. P. C. 95. H. Dal. ca. 103. 3 Inſt. 110. Bro. Indictm. 33. 1 H. H. P. C. 515.

Sect. 29. Alſo it is ſaid, That there may be Felony in taking Goods the Owner whereof is unknown, in which Caſe the King ſhall have the Goods, and the Offender ſhall be indicted from taking *Bona cujuſdam Hominis ignoti*; and it ſeems, That in ſome Caſes the Law will rather feign a Property, where in Strickneſs there is none, than ſuffer an Offender to eſcape; and therefore it is ſaid, That he who takes away the Goods of a Chapel, or Abbey, in Time of Vacation, may be indicted in the firſt Caſe, for ſtealing *Bona Capellæ*, being in the Cuſtody of ſuch and ſuch, and in the ſecond, for ſtealing *Bona Domus & Eccleſiæ*, *&c.* and *a fortiori* therefore it follows, That he who ſteals Goods belonging to a Pariſh-Church, may be indicted for ſtealing *Bona Parochianorum*; and it hath been adjudged, That he who takes off a [a] Shrowd from a dead Corps, may be indicted as having ſtoln it from him who was the Owner thereof when it was put on, for a dead Man can have no Property.

[a] 3 Inſt. 110. 12 Co. 113. H. P. C. 67. Con. Dal. ca. 103.

[b] 7 H. 6. 43. a. 5 H. 7. 18. b. Bro. Coro. 45, 160. Cro. Eliz. 536. S. P. C. 26. A. 3 Inſt. 110. Mo. Pl. 981. Dalt. ca. 103. [c] H. P. C. 67. Kellew. 70. b.

Sect. 30. And there is a ſpecial Caſe wherein it is ſaid, That a Man may commit Larceny by taking of Things, whereof the abſolute Property is in himſelf; as if *A.* [b] deliver Goods to *B.* being a Tailor, or Carrier, *&c.* and afterwards, with an Intent to make him anſwer for them fraudulently and ſecretly take them away; for *B.* had a ſpecial Kind of Property in the Goods ſo delivered to him, in reſpect whereof, if a [c] Stranger had ſtoln them, he might have been indicted generally as having ſtoln *B.*'s Goods, and the Injury is altogether as great, and the Fraud as baſe, where they are taken away by the very Owner.

Sect. 31. As to the ſixth [a] Point, *viz.* of what Value the Goods ſtoln muſt be, if they be but of the Value of 12 *d.* or under, the Offence can be but Petit Larceny.

[a] 22 Aſſ. 39. 1 H. H. P. C. 530. Bro. Coro. 84, 85.

S. P. C. 24. H. K. 2 Rol. Re. 78. Dal. ca. 101. 2 Inſt. 189. Kelynge 68. H. P. C. 69, 70.

Sect. 32. Yet [b] if two Perſons, or more, together, ſteal Goods above the Value of twelve Pence, every one of them is guilty of Grand Larceny, for each Perſon is as much an Offender as if he had been alone.

[b] S. P. C. 24. K. Dal. ca. 101. H. P. C. 70. Crom. 36. a.

Sect. 33. Alſo it [c] ſeems the current Opinion of all the old Books, That if one at ſeveral Times ſteal ſeveral Parcels of Goods, each under the Value of twelve Pence, but amounting in the whole to more, from the ſame Perſon, and be found guilty thereof on the ſame Indictment, he ſhall have Judgment of Death as for Grand Larceny; but this Severity is ſeldom practiſed.

[c] S. P. C. 24. I. K. 1 H. H. P. C. 531. Crom. 36. a. Dal. ca. 101. H. P. C. 70. 2 Keb. 719.

In what Caſes ſimple Larceny is excluded from the Benefit of the Clergy will be ſhewn hereafter in the ſecond Book, in the Chapter concerning Clergy.

Sect. 34. And now we are come to Petit Larceny, which ſeems to agree with Grand Larceny in all the Particulars above-mentioned, except only the Value of the Goods; ſo that where-ever an Offence would amount to Grand Larceny, if the Thing ſtoln were above the Value of twelve Pence, it is Petit Larceny, if it be but of that Value or under.

H. P. C. 69. 1 H. H. P. C. 503.

Sect. 35. And if one be indicted for ſtealing Goods to the Value of ten Shillings, and the Jury find ſpecially that he is guilty, but that the Goods are worth but ten Pence, he ſhall not have Judgment of Death, but only as for Petit Larceny.

Bro. Coro. 84, 184. S. P. C. 24. L. Dal. ca. 101. Crom. 36. a. Hetl. 66.

Sect. 36. It ſeems that all Petit Larceny is Felony, and conſequently requires the word *Felonicè*, in an Indictment for it; yet it is certain, That it is not puniſhed with the Loſs of Life, or Lands, but only with the Forfeiture of Goods and Chattels, and whipping, or other corporal Puniſhment.

7 H. 8. 23. Bro. Coro. 2. 219. 1 H. H. P. C. 530. Appeal 72. 143. H. P. C. 70. Con. S. P. C. 24. b. Dalt ca. 101.

CHAP. XXXIV.

Of Robbery.

Sect. 1. MIXT or complicated Larceny is ſuch as hath a farther Degree of Guilt in it, as being a Taking from the Perſon of a Man, or from his Houſe.

Sect. 2. Larceny from the Perſon of a Man either puts him in Fear, and then it is called Robbery; or does not put him in Fear, and then it is called barely, Larceny from the Perſon.

Sect. 3. Robbery is a felonious and violent Taking away from the Perſon of another, Goods or Money to any Value, putting him in Fear.

H. P. C. 71. 2 Inſt. 68. 1 H. H. P. C. 532.

In

In the Explication whereof, I ſhall conſider the following Particulars:

1. What Taking away will ſatisfy the Word *Cepit* in an Indictment for this Offence.
2. What ſhall be ſaid to be a Taking away from the Perſon.
3. What kind of Taking ſhall be ſaid to be violent.
4. In what Reſpects Robbery differs from other Larcenies.

H. P. C. 72. 44 E. 3. 14. b. 4 H. 4. 3. a. Dalt. cap. 100. S. P. C. 27. f. Crom. 34. a. 3 Inſt. 68. Fitz. Cor. 464.

Sect. 4. As to the firſt Point, *viz.* What Taking away will ſatisfy the Word *Cepit* in an Indictment for Robbery; it ſeems clear, That he who receives my Money by my Delivery, either whilſt I am under the Terror of his Aſſault, or afterwards while I think my ſelf bound in Conſcience to give it him by an Oath to that Purpoſe, which in my Fear I was compelled by him to take, may in the Eye of the Law, as properly be ſaid to take it from me, as he who actually takes it out of my Pocket with his own Hands.

3 Inſt. 69. H. P. C. 72.

Sect. 5. Neither can he who has once actually compleated the Offence, by taking my Goods in ſuch a Manner into his Poſſeſſion, afterwards purge it by any Re-delivery, *&c.*

S. P. C. 27. g. Crom. 34. 3 Inſt. 69. Dalt. cap. 100. H. P. C. 71, 72. 1 H. H. P. C. 532.

Sect. 6. But he who only attacks me in order to rob me, but does not take my Goods into his Poſſeſſion, though he go ſo far as to cut off the Girdle of my Purſe, by Reaſon whereof it falls to the Ground, is not guilty of Robbery; but highly puniſhable by Fine and Impriſonment, &c. for ſo enormous a Breach of the Peace. [37]

1 H. H. P. C. 533, 534, 537. Crom. 34. a. b.

Sect. 7. Yet in ſome Caſes a Man may be ſaid to rob me, where in Truth he never actually had any of my Goods in his Poſſeſſion; as where I am robbed by ſeveral in one Gang, and one of them only takes my Money, in which Caſe, in Judgment of Law, every one of the Company ſhall be ſaid to take it, in reſpect of that Encouragement which they give to one another, through the Hopes of mutual Aſſiſtance in their Enterprize: Nay, though they miſs of the firſt intended Prize, and one of them afterwards ride from the reſt, and rob a third Perſon in the ſame High-way without their Knowledge out of their View, and then return to them, all are guilty of Robbery, for they came together with an Intent to rob, and to aſſiſt one another in ſo doing.

1 And. 116. Pudſey's Caſe. Crom. 34. Dalt. cap. 100. H. P. C. 72. B. 2. Ch. 29. S. 8.

Sect. 8. As to the ſecond Point, *viz.* What ſhall be ſaid to be a Taking away from the Perſon; not only the taking away a Horſe from a Man whereon he is actually riding, or Money out of his Pocket, but alſo the Taking of any Thing from him openly and before his Face, which is under his immediate and perſonal Care and Protection, may properly enough be ſaid to be a Taking from the Perſon: And therefore he who having firſt aſſaulted me takes away my Horſe ſtanding by me, or having put me in Fear, drives my Cattle in my Preſence out of my Paſture, or takes up my Purſe which in my Fright I caſt into a Buſh, or my Hat which fell from my Head, or robs my Servant of my Money before my Face, may be indicted as having taken ſuch Things from my Perſon. [38]

S. P. C. 27. d. Crom. 34, 35. Dalt. cap. 100. 3 Inſt. 69. H. P. C. 73. 1 H. H. P. C. 533. Sty. Rep. 156. Salk. 613. Carth. 145.

Sect. 9. As to the third Point, *viz.* What kind of Taking ſhall be ſaid to be violent; where-ever a Perſon aſſaults another with ſuch Circumſtances of Terror as put him into Fear, and cauſes him by Reaſon of ſuch Fear to part with his Money, the Taking thereof is adjudged Robbery, whether there were any Weapon drawn or not, or whether the Perſon aſſaulted delivered his Money upon the other's Command, or afterwards gave it him upon his ceaſing to uſe Force, and begging an Alms; for he

1 H. H. P. C. 533, 534. H. P. C. 71, 72. Crom. 34. b. Dal. cap. 100.

was put into Fear by his Aſſault, and gives him his Money to get rid of him. [39]

Sect. 10. And ſome have gone ſo far as to hold, That if a Man, meeting another going with his Goods to Market in order to ſell them, compel him to ſell them to him againſt his Will, he is guilty of Robbery, though he give for them more than they are worth: But perhaps this Opinion is too ſevere, becauſe the Grievance to the Party ſeems rather to proceed from the Perverſeneſs of his Humour, than from any real Injury done to him; and there ſeems to be no ſuch Enormity in the Intention of the Wrong-doer, as is implied in the Notion of Felony. Crom. 34. b. 35. Dalt.cap.100.

Sect. 11. However it is certain, That the Claim of Property, in the Thing taken away, without any Colour, is no manner of Excuſe. 1 H. H. P. C. 509. H. P. C. firſt Edition 62.

As to the fourth Point, *viz.* In what Reſpects Robbery differs from other Larcenies.

Sect. 12. I. No other Larceny ſhall have Judgment of Death, unleſs the Thing ſtoln be above the Value of twelve Pence; but Robbery ſhall have ſuch Judgment, how ſmall ſoever the Value may be of the Thing taken away. S. P. C. 27. a. Crom. 33. b. Dal. cap.100. H. P. C. 74.

Sect. 13. II. Other Larcenies whether from the Perſon or not, ſhall not be ſuppoſed to be done with Violence or Terror, but Robbery is always laid as done on an Aſſault with Violence, and putting the Party in Fear, which is properly thus expreſſed in an Indictment, ——— *à Perſona* J. S. *violenter & felonicè cepit & aſportavit in magnum prædicti* J. S. *terrorem.* H. P. C. 74. 3 Inſt. 68. Kelynge 70.

Sect. 14. III. But they all agree in this, That the Offenders had the Benefit of the Clergy at the Common Law, but many of them are at this Day excluded in many Caſes by Statute; for which ſee the Chapter in the ſecond Book concerning Clergy.

CHAP. XXXV.

Of Larceny from the Perſon.

Sect. 1. LArceny from the Perſon of a Man without putting him in Fear, is either done privily without his Knowledge, (in which Caſe it is excluded from the Benefit of the Clergy by 8 *El.* 4.) or openly and avowedly before his Face; as if one take off my Hat from my Head, and run away with it, or come into my Shop and cheapen Goods, and run away with them without paying for them, which is agreed not to be Robbery, and as it ſeems is more properly indictable as a Treſpaſs than Felony, unleſs the Offender were either unknown, or immediately fled the Country if he were known; otherwiſe I have a Remedy againſt him in the ordinary Courſe of civil Juſtice; and it ſeems rigorous to make ſuch Offences capital, which probably may ſufficiently be provided againſt by more gentle Methods. Dy. 224. Pl. 30. 2 Rol. Re. 154. H. P. C. 73, 74, 75. Crom. 34. b. Dalt. cap. 100. Raym. 275, 276.

Sect. 2. However it is certain, That all open Larcenies from the Perſon are within the Benefit of the Clergy, except ſuch as are committed in a Dwelling-Houſe, *&c.* to the Value of forty Shillings, from which it is taken away by 12 *Ann.* 7.

1 H. H. P. C. 529. H. P. C. 75. *Sect.* 3. Alſo a private Larceny from the Perſon ſhall have the Benefit of the Clergy, unleſs it be laid in the Indictment as done *clam* and *ſecrete*, &c. in exact Purſuance of the Words of 8 *El.* 4.

H. P. C. 75. Dalt. cap. 100. *Sect.* 4. And no ſuch Larceny ſhall have Judgment of Death but only as of Petit Larceny, if the Jury find the Offender guilty under the Value of twelve Pence; for the Statute does not alter the Nature of the Offence, or make that Capital which was not ſo before, but only leaves the Offender to the Judgment of the Common Law.

CHAP. XXXVI.

Of Larceny from the Houſe.

H. P. C. 76. *Sect.* 1. THE other Branch of complicated Larceny, is that which is from the Habitation of a Man, which though it ſeem to have a higher Degree of Guilt than ſimple Larceny, yet I do not find it diſtinguiſhed from it by the Common Law, either as to the Circumſtances above mentioned, which are requiſite to conſtitute the Offence, or as to the Puniſhment.

Sect. 2. However it is at this Day excluded from the Benefit of the Clergy in many Caſes by ſeveral Acts of Parliament, which I ſhall particularly conſider in the ſecond Book in the Chapter concerning Clergy.

CHAP. XXXVII.

Of Piracy.

Sect. 1. TO what has been ſaid concerning ſuch Larcenies as are Felonies by the Common Law, it may not be improper to add ſomewhat concerning Piracy and Depredation at Sea, which is a capital Offence by the Civil Law. [40]

40 Aſſ. 25. 3 Inſt. 115. S. P. C. 10. b. H. P. C. 77. 28 H. 8. c. 15. 3 Inſt. 112. H. P. C. 77. 3 Inſt. 112. *Sect.* 2. It is ſaid, That before 25 *Ed.* 3. this Offence was puniſhed at Common Law as Petit Treaſon, if committed by a Subject, and as Felony, if committed by a Foreigner: However it ſeems agreed, that after that Statute by which all Treaſon is confined to the Particulars therein ſet down, it was cognizable only by the Civil Law.

Sect. 3. But this proving very inconvenient, becauſe by that Law no Offender ſhall have Judgment of Death, without his own Confeſſion, or direct Proof by Eye-Witneſſes, it was enacted by 28 *H.* 8. 15. *That all Felonies and Robberies*, &c. *upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have or pretend to have Power, Authority or Juriſdiction, ſhall be inquired, tried, heard, determined and judged in ſuch Shires and Places in the Realm, as ſhall be limited by the King's Commiſſion or Commiſſions to be directed for the ſame, in like Form and Condition, as if any ſuch Offence or Offences had been committed or done in or upon the Land, and ſuch Commiſſions ſhall be had under the King's Great Seal, directed to the Admiral or Admi-*

rals, or to his or their Lieutenant, Deputy and Deputies, and to three or four ſuch other ſubſtantial Perſons, as ſhall be named or appointed by the Lord Chancellor of England *for the Time being, from Time to Time, and as oft as Need ſhall require, to hear and determine ſuch Offences, after the common Courſe of the Laws of this Land uſed for Felonies and Robberies, &c. done and committed upon the Land within this Realm.*

Sect. 4. And it is farther enacted by the ſaid Statute, *That if any Perſon or Perſons happen to be indicted for any ſuch Offence done, or hereafter to be done, upon the Seas, or in any other Place above limited, that then ſuch Order, Proceſs, Judgment and Execution, ſhall be uſed, had, done and made, to and againſt every ſuch Perſon and Perſons ſo being indicted, as againſt Felons, &c. for any Felony, &c. upon the Land, by the Laws of the Land is accuſtomed.*

Sect. 5. And it is farther enacted by the ſaid Statute, *That ſuch as ſhall be convict of any ſuch Offence by Verdict, Confeſſion, or Proceſs by Authority of any ſuch Commiſſion, ſhall have and ſuffer ſuch Pains of Death, Loſſes of Lands, Goods and Chattels, as if they had been attainted and convicted of ſuch Offence done upon the Land, and alſo that they ſhall be excluded from the Benefit of the Clergy.* See the Ch. of Clergy.

In the Expoſition of this Act it has been holden,

Sect. 6. I. That it does not alter the Nature of the Offence, ſo as to make that which was before a Felony only by the Civil Law, now become a Felony by the Common Law; for the Offence muſt ſtill be alledged as done upon the Sea, and is no Way cognizable by the Common Law, but only by Virtue of this Statute, which by ordaining that in ſome Reſpects it ſhall have the like Trial and Puniſhment, as are uſed for Felony at Common Law, ſhall not be carried ſo far as to make it alſo agree with it in other Particulars which are not mentioned: And from hence it follows, That this Offence remains as before of a ſpecial Nature, and that it ſhall not be included in a general Pardon of all Felonies, which, as it was before this Statute, to be expounded of no Felonies which are ſuch only by the Civil Law, ſhall continue ſtill to have the ſame Conſtruction. 3 Inſt. 112, 113. H. P. C. 77. Moore 756. 3 Inſt. 112. Co. Lit. 391. H. P. C. 77.

Sect. 7. From the ſame Ground alſo it follows, That no Perſons ſhall, in Reſpect of this Statute, be conſtrued to be, or puniſhed as, Acceſſaries to Piracy before or after, as they might have been if it had been made a Felony by the Statute, whereby all thoſe would incidentally have been made Acceſſaries in the like Caſes, in which they would have been Acceſſaries to a Felony at Common Law: And from hence it follows, That Acceſſaries to Piracy being neither expreſly named in the Statute, nor by Conſtruction included in it, remain as they were before, and were triable by the Civil Law, if their Offence were committed on the Sea, but if on the Land, by no Law until 11 and 12 *Will.* 3. 7. for 2 and 3 *Ed.* 6. 24. which provides againſt Acceſſaries in one County to a Felony in another, extends not to Acceſſaries to an Offence committed in no County, but on the Sea; but by the ſaid Statute of 11 and 12 *Will.* they are triable in like Manner as the Principals are by the Statute of 28 *H.* 8. 3 Inſt. 112. H. P. C. 77, 215.

Sect. 8. From the ſame Ground alſo it follows, That an Attainder for this Offence corrupts not the Blood, inaſmuch as the Statute only ſays that the Offender ſhall ſuffer ſuch Pains of Death, *&c.* as if he were attainted of a Felony at Common Law; but ſays not that the Blood ſhall be corrupted, *&c.* 3 Inſt. 112. H. P. C. 77. B. 2. Ch. 23. Sect. 12.

Sect. 9. Yet it has been reſolved, That an Offender ſtanding mute on an Arraignment by Force of this Statute, ſhall have Judgment of Pain *Fort & dure*; for the Words of the Statute are, *That a Commiſſion ſhall be directed* 3 Inſt. 114. Dyer 241. Pl. 49, 308. Pl. 73. H. P. C. 78.

directed, &c. *to hear and determine ſuch Offences after the common Courſe of the Laws of the Land*, &c.

Sect. 10. II. It has been holden, That the Indictment for this Offence muſt alledge the Fact to be done upon the Sea, and muſt have both the Words *Felonicè* and *Piraticè*: And that no Offence is puniſhable by Virtue of this Act as Piracy, which would not have been Felony if done on the Land, and conſequently that the Taking of an Enemy's Ship by an Enemy, is not within the Statute.

3 Inſt. 112. S.P.C. 114. a. 1 Rol.Re.175.

Sect. 11. III. It is agreed, That this Statute extends not to Offences done in Creeks or Ports within the Body of a County, becauſe they are, and always were, cognizable by the Common Law.

Moore 756. 1 Rol.Re.175. H. P. C. 77. 3 Inſt. 113.

Sect. 12. It is enacted by 11 and 12 *Wil.* 3. 7. which was continued by 1 *Georg.* 25. for five Years, and from thence to the End of the next Seſſions of Parliament, *That all Piracies, Felonies and Robberies committed in or upon the Sea, or in any Place where the Admiral has Juriſdiction, may be tried and determined at Sea or upon the Land, in any of his Majeſty's Iſlands, or Plantations*, &c. *to be appointed by the King's Commiſſion under the Great Seal, or the Seal of the Admiralty, directed to any of the Admirals*, &c. *and ſuch Perſons and Officers by Name, or for the Time being, as his Majeſty ſhall think fit, who ſhall have Power jointly or ſeverally, by Warrant under Hand and Seal of any of them, to commit any Perſon againſt whom Information of any ſuch Offences ſhall be given upon Oath, and to call a Court of Admiralty, which ſhall conſiſt of ſeven Perſons at the leaſt, and ſhall proceed in the Trial of the ſaid Offenders, according to ſuch Directions as are ſet forth at large in the ſaid Statute.*

Sect. 13. And it is farther enacted by the ſaid Statute, Par. 8. *That if any of his Majeſty's natural born Subjects or Denizens of this Kingdom, ſhall commit any Piracy or Robbery, or any Act of Hoſtility, againſt other his Majeſty's Subjects upon the Sea, under Colour of any Commiſſion from any foreign Prince or State, or Pretence of Authority from any Perſon whatſoever, ſuch Offender and Offenders, and every of them, ſhall be deemed, adjudged, and taken to be Pirates, Felons and Robbers; and they and every of them being duly convicted thereof, according to this Act, or the aforeſaid Statute of King* Henry *the Eighth, ſhall have and ſuffer ſuch Pains of Death, Loſs of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and ſuffer.*

Sect. 14. And it is farther enacted by the ſaid Statute, *That if any Commander or Maſter of any Ship, or any Seaman or Mariner, ſhall in any Place where the Admiral hath Juriſdiction, betray his Truſt and turn Pirate, Enemy or Rebel, and piratically and felonioufly run away with his or their Ship or Ships, or any Barge, Boat, Ordnance, Ammunition, Goods or Merchandizes, or yield them up voluntarily to any Pirate, or bring any ſeducing Meſſage from any Pirate, Enemy or Rebel, or conſult, combine, or confederate with, or attempt or endeavour to corrupt, any Commander, Maſter, Officer or Mariner to yield up or run away with any Ship, Goods or Merchandize, or turn Pirate, or go over to Pirates, or if any Perſon ſhall lay violent Hands on his Commander, whereby to hinder him from fighting in Defence of his Ship and Goods committed to his Truſt, or that ſhall confine his Maſter, or make or endeavour to make a Revolt in his Ship, ſhall be adjudged to be a Pirate, Felon and Robber; and being convicted thereof, according to the Direction of this Act, ſhall have and ſuffer Pains of Death, Loſs of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and ſuffer.*

Sect. 15. And it is farther enacted by the ſaid Statute, *That all and every Perſon and Perſons whatſoever, who ſhall either on the Land or upon the Seas, wittingly or knowingly ſet forth any Pirate, or aid and aſſiſt, or maintain, procure, command, counſel, or adviſe any Perſon or Perſons whatſoever, to do or*

mmit any Piracies or Robberies upon the Seas; and ſuch Perſon or Perſons all thereupon do or commit any ſuch Piracy or Robbery, then all and every ch Perſon or Perſons whatſoever, ſo as aforeſaid, ſetting forth any Pirate, or iding or aſſiſting, maintaining procuring, commanding, counſelling or advi- ng the ſame, either on the Land or upon the Sea, ſhall be adjudged to be Acceſ- ry to ſuch Piracy and Robbery done and committed: And further, *That after ny Piracy or Robbery is or ſhall be committed by any Pirate or Robber what- ver, every Perſon or Perſons, who, knowing that ſuch Pirate or Robber has one or committed ſuch Piracy and Robbery, ſhall on the Land or upon the Sea eceive, entertain, or conceal any ſuch Pirate or Robber, or receive or take nto his Cuſtody, any Ship, Veſſel, Goods or Chattels, which have been by any uch Pirate or Robber piratically and felonioufly taken, ſhall be, by this Sta- ute likewiſe adjudged to be Acceſſary to ſuch Piracy and Robbery: And that ll ſuch Acceſſaries to ſuch Piracies and Robberies, ſhall be enquired of, tried, eard, determined and adjudged according to the common Courſe of the Law, ccording to the ſaid Statute of* 28 H. 8. *as the Principals of ſuch Piracies nd Robberies may be, and no otherwiſe; and being thereupon attainted ſhall uffer ſuch Pains of Death, Loſs of Lands, Goods and Chattels, and in like Manner as the Principals of ſuch Piracies, Robberies and Felonies, ought o ſuffer according to the ſaid Statute of* H. 8. *which is declared to be in full Force, any thing in this laſt Act to the contrary notwithſtanding.* [41]

Sect. 16. And by 4 Georg. 1. c. 11. Par. 7. *All Perſons who ſhall commit ny Offence for which they ought to be adjudged Pirates, Felons or Robbers, by* 11 & 12 Guli. 3. *may be tried and judged for every ſuch Offence, according to the Form of* 28 H. 8. *and ſhall be excluded from their Clergy.*

CHAP. XXXVIII.

Of Burglary.

AND now we are come to Offences againſt the Habitation of a Man, which are of two kinds: H. P. C. 79. 22 Aſſ. 95. Bro. Cor. 93. 3 Inſt. 63. S. P. C. 30. a. Dalt. cap. 99. Crom. 31. a.

1. Burglary.
2. Arſon.

Sect. 1. Burglary is a Felony at the Common Law, in breaking and entering the Manſion-Houſe of another, or (as ſome ſay,) the Walls or Gates of a walled Town in the Night, to the Intent to commit ſome Felony within the ſame, whether the felonious Intent be executed or not. 1 H. H. P. C. 549. 2 H. H. P. C. 360.

For the better Underſtanding whereof, I ſhall conſider the following Particulars:

1. What ſhall be accounted Night-time for this Purpoſe.
2. Whether there muſt be both an actual Entry and Breaking.
3. What Breaking is ſufficient.
4. What Entry.
5. In what Place this Offence may be committed.
6. What Degree of Guilt is required in the principal Intention.

Sect. 2. [a] As to the firſt Point, *viz.* What ſhall be accounted Night-Time for this Purpoſe; there are ſome Opinions, That Burglary may be committed at any Time after Sun-ſet, and before Sun-riſing; but it ſeems the much better Opinion, That the Word *Noctanter*, which is preciſely neceſſary [a] Dalt. cap. 99. S. P. C. 30. a. Crom 33. a. H. P. C. 79. 3 Inſt. 63. Savil. 47. Crom. 32. a. 7 Co. 6. 1 H. H. P. C. 550, 551.

neceſſary in every Indictment for this Offence, cannot be ſatisfied in a legal Senſe, if it appear upon the Evidence, that there was ſo much Day-light at the Time, that a Man's Countenance might be diſcerned thereby. [42]

Dalt. cap. 99. Crom. 32. a. Dyer 99. a. S. P. C. 30. a. 3 Inſt. 64. H. P. C. 80. 1 H. H. P. C. 551, 555, 559. Con. Dalt. cap. 99.

Sect. 3. As to the ſecond Point, *viz.* Whether there muſt be both an Entry and Breaking; notwithſtanding ſome looſe Opinions to the contrary, there ſeems to be no good Cauſe to doubt but that both are required to compleat this Offence, for the Words, *fregit* and *intravit*, being both of them preciſely neceſſary in the Indictment, both muſt be ſatisfied: And *à fortiori* therefore there can be no Burglary, where there is neither of them; as if on a bare Aſſault upon a Houſe the Owner fling out his Money.

Crom. 31. b. 3 Inſt. 64. H. P. C. 80. 1 H. H. P. C. 551, 552.

Sect. 4. As to the third Point, *viz.* What Breaking is ſufficient; it ſeems agreed, That ſuch a Breaking as is implied by Law in every unlawful Entry on the Poſſeſſion of another, whether it lie open or be incloſed, and will maintain a common Indictment, or Action of Treſpaſs *Quare clauſum fregit*, will not ſatisfy the Words *Felonicè & Burglariter fregit*, except in ſome ſpecial Caſes, in which it is accompanied with ſuch Circumſtances as make it as heinous as an actual Breaking: And from hence it follows, That if one enter into a Houſe by a Door which he finds open, or through a Hole which was made there before, and ſteal Goods, &c. or draw any thing out of a Houſe through a Door or Window which were open before, or enter into a Houſe by the Doors open in the Day-time, and lie there till Night, and then rob and go away, without breaking any Part of the Houſe, he is not guilty of Burglary. But it is certain, That he would have been guilty thereof if he had opened the Window, or unlocked the Door, or broke a Hole in the Wall, and then had entered, &c. or if having entered by a Door which he found open, or having lain in the Houſe by the Owner's Conſent, he had but unlatched a Chamber Door; or if he had come down by the Chimney: (in which Caſe though it might be ſaid, That the Houſe was open there, and ſo not actually broken; yet it was as much incloſed as the Nature of the Thing would bear.) And according to ſome Opinions, he would have been in like Manner guilty, if upon an Aſſault made by him upon the Houſe, with an Intent to rob it, the Owner had opened the Door in order to drive him off, and thereupon he had entered: (in which Caſe, as ſome ſay, the opening of the Door by the Owner, being occaſioned by the felonious Attempt of the other, is as much imputable to him as if it had been actually done by his own Hands.) [43]

H. P. C. 80, 82. Con. Dal. 99. Crom. 34. a. H. P. C. 81. Dalt. cap. 99. 1 And. 115. H. P. C. 80. Dalt. cap. 99. Savil 47. Dal. cap. 99. Kelynge 67. H. P. C. 81, 82. Hutt. 20. Crom. 32. a. Con. 1 And. 115.

Kelynge 42. Kelynge 63. Crom. 32. b. Dalt. cap. 99. H. P. C. 81. 1 H. H. P. C. 552.

Sect. 5. And it has alſo been reſolved, That where divers Perſons came to a Houſe with an Intent to rob it, and knocked at the Door, pretending to have Buſineſs with the Owner, and being by that Means let in, rifled the Houſe, they were guilty of Burglary: Alſo it hath been adjudged, That thoſe were no leſs guilty, who, having a Deſign to rob a Houſe, took Lodgings in it, and then fell on the Landlord and robbed him; for the Law will not endure to have its Juſtice defrauded by ſuch Evaſions. And for the like Reaſon, *à fortiori*, it has been reſolved, That where Perſons, intending to rob a Houſe, raiſed a Hue and Cry, and prevailed with a Conſtable to make a Search in the Houſe, and having got in by that Means, with the Owner's Conſent, bound the Conſtable, and robbed the Inhabitants, they were guilty of Burglary; for there cannot be a greater Affront to publick Juſtice, than to make Uſe of legal Proceſs as a Stale for ſuch villanous Purpoſes; and therefore the whole Act is eſteemed tortious *ab initio*.

Sect. 6. It is recited by 12 *Annæ*, 7. *That there had been ſome Doubt, Whether the entring into a Manſion-Houſe, without breaking the ſame, with an Intent to commit ſome Felony, and breaking the ſaid Houſe in the Night-time to get out, were Burglary:* And thereupon it is declared and enacted, *That if any Perſon ſhall enter into the Manſion or Dwelling-Houſe of another by Day or by Night, without breaking the ſame, with an Intent to commit Felony, or being in ſuch a Houſe, ſhall commit any Felony, and ſhall in the Night-time break the ſaid Houſe to get out of the ſame, ſuch Perſon is, and ſhall be taken to be, guilty of Burglary, and ouſted of the Benefit of Clergy, in the ſame Manner as if ſuch Perſon had broken and entred the ſaid Houſe in the Night-time, with an Intent to commit Felony there.*

Sect. 7. As to the fourth Point, *viz.* What Entry is ſufficient to this Purpoſe; it ſeems agreed, That any the leaſt Entry, either with the whole, or but with Part of the Body, or with any Inſtrument, or Weapon, will ſatisfy the Word *Intravit* in an Indictment of Burglary; as if one do but put his Foot over a Threſhold, or his Hand, or a Hook, or Piſtol, within a Window, or turn the Key of a Door which is locked on the Inſide, or diſcharge a loaded Gun into a Houſe, *&c.* [44]

Dalt. cap. 99. H. P. C. 81. 1 And. 115. 1 H. H. P. C. 553, 555. Crom. 31, 32. Crom. 32. a. Con. 1 And. 115.

Sect. 8. Nay, it is certain, That in ſome Caſes one may be guilty of Burglary, who never made any actual Entry at all; as where divers come to commit a Burglary together, and ſome ſtand to watch in adjacent Places, and the others enter, and rob, *&c.* for in all ſuch Caſes, the Act of one is in Judgment of Law the Act of all.

1 H. H. P. C. 439, 555. Crom. 32. a. H.P.C.80,81.

Sect. 9. And upon the like Ground, it ſeems difficult to find a Reaſon, why a Servant, who, confederating with a Rogue, lets him in to rob a Houſe, *&c.* ſhould not be guilty of Burglary as much as he; for it is clear, That if the Servant were out of the Houſe, the Entry of the other would be adjudged to be his alſo; and what Difference is there, when he is in the Houſe? [45]

Con. H. P. C. 81. Dalt. cap. 99.

Sect. 10. As to fifth Point, *viz.* In what Place this Offence may be committed, it ſeems to be the current Opinion at this Day, That it can be only in a Dwelling-Houſe, and that the Indictment for it muſt neceſſarily alledge the Fact *in Domo manſionali.* And Sir *Edward Coke* ſeems to ſay, That the Breaking a Church, *&c.* is therefore Burglary, becauſe the Church is the Manſion-Houſe of God: But I can find nothing in the more ancient Authors to countenance this Nicety; for the general Tenor of the old Books ſeems to be, That Burglary may be committed in breaking Houſes, or Churches, or the Walls, or Gates of a Town. And *Staunforde* and *Anderſon* mention Precedents of Indictments of Burglary *in Domo*, without adding *Manſionali:* However the conſtant Courſe of late Precedents and Opinions makes it certainly a very dangerous if not an Incurable, Fault, to omit the Word *Manſionalis* in an Indictment of Burglary in a Houſe; and therefore without Queſtion, it ought always to be inſerted where the Truth of the Caſe will bear it. But ſure it cannot be neceſſary or proper to have any ſuch Word in an Indictment of Burglary in a Church, which, by all the Books above cited, ſeems to be taken as a diſtinct Burglary from that in a Houſe.

1 H. H. P. C. 550. 4 Co. 40. a. 3 Inſt. 64, 67. H. P. C. 82, 86. 3 Inſt. 64. H. P. C. 82. Bract. 144. b. Bro. Coro. 93. 22 Aſſ. 39, 95. Dalt. cap. 99. 27 Aſſ. 38. 1 And. 302. S. P. C. 30. Poph. 42. 1 H. H. P. C. 549 from Spelman's Gloſſ. Verb. Burglaria. Dalt. cap. 99. [a] 1 H. H. P. C. 556. Crom. 33. b. Dalt. cap. 99. H. P. C. 82. Moor 66e. Pl. 903. 4 Co. 40. a. Cro. Car. 474. 1 Jon. 394. H. P. C. 82. Kelynge 54. Poph. 42, 52. 3 Inſt. 64. Skin. 685.

Sect. 11. [a] However it is agreed by all, That a Houſe wherein a Man dwells but for Part of the Year, or a Houſe which one has hired to live in, and brought Part of his Goods into, but has not yet lodged in; or a Chamber in one of the Inns of Court wherein a Perſon uſually lodges, or a Houſe which a Man's Wife hires without his Privity, and lives in by herſelf without him, may be called his Dwelling-Houſe; and will ſufficiently ſatisfy the Words *Domus manſionalis* in the Indictment, whether any Perſon were actually therein, or not, at the Time of the Offence.

Sect. 12.

3 Inſt. 64. Dalt. cap. 99. Bro. Cor. 180. Crom. 32. b. 1 H. H. P. C. 558, 559. H. P. C. 82.

Sect. 12. Alſo all Out-Buildings, as Barns, Stables, Dairy-Houſes, *&c.* adjoining to a Houſe, are looked upon as Part thereof, and conſequently Burglary may be committed in them; but if they be removed at any Diſtance from the Houſe, it ſeems that it has not been uſual of late to proceed againſt Offences therein as Burglaries.

Kelynge 27, 52, 83.

Sect. 13. If ſeveral Perſons dwell in one Houſe, as Servants, Gueſts, or Tenants at Will, or otherwiſe having no fix'd and certain Intereſt in any Part thereof, and a Burglary be committed in any of their Apartments; it ſeems clear, that the Indictment ſhall lay the Offence in the Manſion-Houſe of the Proprietor, *&c.* But if one hire a diſtinct Apart-

1 H. H. P. C. 556. Con. Kelynge 83. Vide ſupra. Sect. 11. Crom. 33. a. Dal. cap. 99.

ment in a Houſe for his Lodging for a certain Time, and a Burglary be committed therein, I can ſee no good Reaſon why the Indictment may not lay the Offence *in Domo manſionali* of ſuch Lodger; for it ſeems to be agreed, That an Indictment for a Burglary committed in a Chamber in one of the Inns of Court, may lay the Offence *in Domo manſionali* of the Owner of the Chamber; and why may not ſuch an Apartment, with as much Propriety be called the Manſion-Houſe of him that takes it, during the Time that he has a certain Intereſt in it? For ſo long as it is ſevered by the Leaſe,

Co. Lit. 48. b. H. P. C. 83.

it ſeems in the Eye of the Law to be as diſtinct from the other Parts of the Houſe, as if the Perſon who rents it, had a Freehold or Inheritance in it. And as to the Objection, That he goes into the Houſe by the ſame Door with the other Inhabitants, and therefore is but an Inmate, and the whole ought to be conſidered but as one Houſe; I anſwer, That he muſt have ſome Way to his Apartment as incident to his Intereſt in it, and that ſuch Way lying through a Door which is common to him with others, doth not make the Apartment itſelf in any Reſpect leſs his own, than a Way through a Door belonging to himſelf only would have done.

Kelynge 83.

Sect. 14. And if the Law be ſo in this Caſe it ſeems to me very reaſonable alſo, That if ſuch a Lodger take alſo a Cellar in the ſaid Houſe, a Burglary committed in ſuch Cellar, may be alledged *in Domo manſionali* of the Lodger, whether the Cellar had any Communication with the Houſe or not; for ſince it ſeems to be agreed, That a Barn or Stable, or other Out-Building near to a Houſe, ſhall be looked on as Part thereof, why ſhould not ſuch a Cellar have the like Eſtimation? *Sed Quære*, for *Kelynge* ſeems to incline to a different Opinion.

Sect. 15. However it is agreed by all, That if one hire a Part of a Houſe to lodge in, which is actually divided from the reſt, and have a Door of its own to the Street, a Burglary therein may be alledged *in Domo manſionali* of ſuch Perſon.

H. P. C. 83. 1 H. H. P. C. 557, 558.

Sect. 16. But if he had taken it as a Shop or Work-houſe for his Uſe in the Day-time only, it ſeems that a Felony therein cannot be alledged in a Manſion-Houſe; not of him that lets it, becauſe it is ſevered by the Leaſe from that Part of the Houſe which belongs to him, nor of him to whom it is let, becauſe he takes it not to lodge in. [46]

H. P. C. 82, 83. 22 Aſſ. 95. Bro. Coro. 93. S. P. C. 30. Dalt. cap. 99. Crom. 31.

Sect. 17. From what has been ſaid it clearly appears, That no Burglary can be committed by breaking into any Ground incloſed, or Booth, or Tent, *&c.* for there ſeems to be no Colour from any Authority ancient or modern, to make any Offence Burglary that is not done either againſt ſome Houſe, or Church, or the Walls, or Gates of ſome Town.

Dy. 99. Pl. 58. Daliſ. 22. 3 Inſt. 65.

Sect. 18. As to the ſixth Point, *viz.* What Degree of Guilt is required in the principal Intention of the Offender, it ſeems clear, That there can be no Burglary but where the Indictment both expreſly alledges, and the Verdict alſo finds, an Intention to commit ſome Felony; for if it appear that

hat the Offender meant only to commit a Treſpaſs, as to beat the Party, &c. he is not guilty of Burglary. However, it ſeems much the better Opinion, That an Intention to commit a Rape, or ſuch other Crime which is made Felony by Statute, and was a Treſpaſs only at Common Law, will make a Man guilty of Burglary, as much as if ſuch Offence were a Felony at Common Law, becauſe where-ever a Statute makes any Offence Felony, it incidentally gives it all the Properties of a Felony at Common Law.

Kelynge 30. H.P.C.83,84. Crom.32. a.b. Con. Dalt. cap. 99. H. P. C. 215. Infra Ch. 40. Sect. 3. 1 H. H. P. C. 562.

CHAP. XXXIX.

Of Arſon.

ARSON is a Felony at Common Law, in maliciouſly and voluntarily burning the Houſe of another by Night or by Day.

1 H. H. P. C. 566. Bro. Coro. 135, 155. S. P. C. 36. 3 Inſt. 66. Dal. cap. 105. 2 Inſt. 188. 11 Co. 29.

For the better Explication whereof I ſhall conſider:

1. What is ſuch a Houſe in which Arſon may be committed.
2. Whether this Offence may be committed in the Offender's own Houſe.
3. How much of the Houſe ought to be burnt.
4. With what Degrees of Malice.

Sect. 1. As to the firſt Point, *viz.* What is ſuch a Houſe in which Arſon may be committed; it ſeems agreed, That not only a Manſion-Houſe, and the principal Parts thereof, but alſo any other Houſe, and the Out-buildings, as Barns, and Stables, adjoining thereto; and alſo Barns full of Corn, whether they be adjoining to any Houſe or not, are ſo far ſecured by Law, that the malicious burning of them is Arſon; and it is ſaid, That in an Indictment they are well expreſſed by the Word *Domus*, without adding *Manſionalis*.

3 Inſt. 67. 4 Co. 20. Dal. ca. 105. 11 H. 7. 1. Bro. Coro. 226. S. P. C. 36. H. P. C. 86. 1 H. H. P. C. 567, 570.

Sect. 2. But it ſeems that at this Day the Burning of the Frame of a Houſe, or of a Stack of Corn, &c. is not accounted Arſon, becauſe it cannot come under the Word *Domus*, which ſeems at preſent to be thought neceſſary in every Indictment of Arſon; yet it is ſaid, That anciently the Burning of a Stack of Corn was accounted Arſon. And at this Day by 43 *El.* 13. *it is Felony without the Benefit of Clergy, wilfully and of Malice to burn or cauſe to be burned, or aid, procure, or conſent to the Burning of any Barn, Stack of Corn, or Grain, in the Counties of* Northumberland, Cumberland, Weſtmoreland *and* Durham. And by 22 and 23 *Ca.* 2. 7. *it is Felony, in the Night-time, maliciouſly, unlawfully, and willingly to burn or cauſe to be burned any Stacks or Ricks of Corn, Hay, or Grain, Barns, or other Houſes, or Buildings, or Kilns, in any Place whatſoever: But the Offender may avoid Judgment of Death by chuſing Tranſportation, and may be proceeded againſt by any three Juſtices of Peace, according to the Method preſcribed by the Statute*, which is ſet forth more at large in Chap. 46.

1 H. H. P. C. 568. H. P. C. 86. 3 Inſt. 67. 3 Inſt. 67. Britt. fo. 16. S. P. C. 36. Dal. cap. 105.

Sect. 3. As to the ſecond Point, *viz.* Whether Arſon may be committed in the Offender's own Houſe, it ſeems clearly agreed, That one ſeized in Fee, or but poſſeſſed for Years, of a Houſe ſtanding by it ſelf at a Di-

1 Jon. 351. Cro. Ca. 377.

a Diſtance from all others, cannot commit Felony in burning the ſame: Alſo it ſeems the much ſtronger Opinion, That a Man ſo ſeized or poſſeſſed of a Houſe in a Town, who burns his own with an Intent to burn his Neighbour's, but in the Event burns his own only, is not guilty of Arſon; for by the general Tenor of the Books ſpeaking of this Offence, it ſeems to be ſuppoſed to be done in the Houſe of another, and not of the Offender: Neither ſhall any Act, which is only a Crime in Reſpect of the Injury which it does, or may do, to another, be made a Felony by Reaſon of an Intention thereby to commit a Felony, if ſuch Intention be not executed: However this is certainly an Offence highly puniſhable, in Regard of the Malice thereof, and the great Danger to the Publick which attends it, and the Offender may be ſeverely fined and impriſoned during the King's Pleaſure, and ſet on the Pillory, and bound to his good Behaviour during Life.

1 H. H. P. C. 568, 569. 3 Inſt. 67. Dalt. cap. 105. Cro. Ca. 338. 1 Inſt. 351. H. P. C. 85. Kelynge 29.

Sect. 4. As to the third Point, *viz.* How much of ſuch Houſe ought to be burnt, it ſeems to be clearly agreed, That neither a bare Intention to burn a Houſe, nor even an actual Attempt to do it by putting Fire to Part of a Houſe, will amount to Felony, if no Part of it be burnt; for the Indictment muſt have the Words *Incendit & combuſſit:* But it is certain, That if any Part of the Houſe be burnt, the Offender is guilty of Felony, notwithſtanding the Fire afterwards be put out, or go out of it ſelf.

1 H. H. P. C. 570. H. P. C. 85. Dal. cap. 105. 3 Inſt. 66.

Sect. 5. As to the fourth Point, *viz.* With what Degrees of Malice ſuch Houſe ought to be burnt; it ſeems clear, That if the Fire happened through Negligence or Miſchance, it cannot make him, who is the unfortunate Cauſe of it, guilty of Arſon; for the Indictment muſt alledge the Offence to have been done *Voluntariè ex malitiâ ſuâ præcogitatâ & felonicè.* Yet if one maliciouſly intending only to burn the Houſe of *A.* happen thereby to burn the Houſe of *B.* it is certain that he may be indicted as having maliciouſly burned the Houſe of *B.* for where a felonious Deſign againſt one Man miſſes its Aim, and takes Effect upon another, it ſhall have the like Conſtruction as if it had been levelled againſt him who ſuffers by it.

1 H. H. P. C. 569. 3 Inſt. 67. H. P. C. 85. Plow. Com. 475.

CHAP. XL.

Of Felonies by Statute.

OFFENCES more immediately againſt the Subject, made capital by Statute, and not reduced to any of the foregoing Heads, are ſuch as are committed;

1. Againſt Women.
2. Againſt the Rights of Marriage.
3. Againſt the Members of a Man's Body.
4. Againſt Records.
5. Againſt Cattle.
6. By Purveyors.
7. By Soldiers and Mariners.
8. By Hunters.

9. By Forgers of falſe Deeds.
10. By Gaolers.
11. By Tranſporters of Sheep or Wool.
12. By Servants.
13. By Egyptians.
14. By Cutters of Pow-dike.
15. By Treſpaſſers on the Borders, and Rioters.
16. By Bankrupts.
17. By Counterfeiters of Bank-Notes, Exchequer-Bills, Stamps, South-Sea Bonds, Lottery-Orders, *&c.*

In treating hereof, I ſhall firſt conſider ſuch Points as relate to them all in general, and then deſcend to each Crime in particular, in the Order before ſet down.

As to what relates to them all in general, I will ſhew,

1. Where an Offence ſhall be ſaid to be made Felony by Statute.
2. What is incidentally implied in every ſuch Statute.

Sect. 1. As to the firſt Point it ſeems clear, That not only thoſe Crimes which are made Felonies in expreſs Words, but alſo all thoſe which are decreed to have or undergo Judgment of Life and Member by any Statute, become Felonies thereby, whether the Word Felony were omitted or mentioned. 1 H. H. P. C. 627, 641, 703. Bro. Coro. 204. 3 Inſt. 91. 2 Inſt. 434. Co. Lit. 391.

Sect. 2. But an Offence ſhall never be made Felony by the Conſtruction of any doubtful and ambiguous Words of a Statute, and therefore, if it be only prohibited under Pain of forfeiting all that a Man has, or of forfeiting Body and Goods, or of being at the King's Will for Body, Land, and Goods, it ſhall amount to no more than a high Miſdemeanor, puniſhable by Impriſonment, *&c.* Hob. 293. Co. Lit. 391. Hob. 270, 293. 3 Inſt. 146.

Sect. 3. Alſo where a Statute makes a ſecond Offence Felony, or ſubject to a heavier Puniſhment than the firſt; it is always implied, That ſuch ſecond Offence ought to be committed after a Conviction for the firſt; from whence it follows, That if it be not ſo laid in the Indictment, it ſhall be puniſhed but as the firſt Offence; for the gentler Method ſhall firſt be tried, which perhaps may prove effectual. 1 H. H. P. C. 324, 685, 705. H. P. C. 8. 2 Bulſt. 349. Dy. 323. Pl. 31. 1 Leon. 295.

Sect. 4. As to the ſecond Point, *viz.* What is incidentally implied in every Statute, making an Offence Felony; it ſeems clear, That every ſuch Statute does by neceſſary Conſequence ſubject the Offender to the like Attainder and Forfeiture, *&c.* and alſo does require the like Conſtruction, as to thoſe who ſhall be accounted Acceſſaries before or after, and to all other Intents and Purpoſes, as is incident to a Felony at Common Law. 3 Inſt. 47, 59, 90. 1 H. H. P. C. 704. Crompt. 42. Pl. 13. H. P. C. 215. Daliſ. 11, 22. B. 2. Ch. 29. Sect. 13, 14. Sal. 542, 543.

Sect. 5. Yet where ſuch a Statute ſaves the Corruption of Blood, it impliedly ſaves the Deſcent of the Land of the Offender to his Heir: Alſo where it ſaves the Land to the Heir, it prevents the Corruption of Blood ſo far; And it is ſaid, That in both Caſes it ſaves the Wife's Dower, becauſe whereever an Heir takes as Heir, he ſhall not avoid a Title of Dower in Reſpect of the ſame Inheritance. But notwithſtanding ſuch a Saving the Land ſhall be forfeited for the Life of the Offender. 3 Inſt. 47. H. P. C. 8. 3 Inſt. 47. 1 H. H. P. C. 703, 704.

Sect. 6. If one commit an Offence which is made Felony by Statute, and then the Statute be repealed, he cannot be puniſhed as a Felon in Reſpect of that Statute. Bro. Coro. 203.

CHAP.

CHAP. XLI.

Of Rape.

OFFENCES againſt Women made Felonies by Statute are of two Kinds.

See 1 H. H. P. C. 626 to 636.

1. Rape.
2. Forcible Marriage.

In treating of Rape, I ſhall conſider,

1. What ſhall be called a Rape.
2. How it is puniſhed.

Co. Lit. 190. 3 Inſt. 60. 2 Inſt. 180. 12 Co. 37. 3 Inſt. 59,60. See 1 H. H. P. C. 628. and Lord Audley's Caſe in the State Trials. H. P. C. 117.

Sect. 1. As to the firſt Point, It ſeems that Rape is an Offence in having unlawful and carnal Knowledge of a Woman, by Force and againſt her Will: But it is ſaid, That no Aſſault upon a Woman in order to raviſh her, howſoever ſhameleſs and outrageous it may be, if it proceed not to ſome Degree of Penetration, and alſo of Emiſſion, can amount to a Rape; however it is ſaid, That Emiſſion is, *primâ facie*, an Evidence of Penetration.

Ruſhworth's Coll. Part 2. Vol. 1. 94. 3 Inſt. 59.

Dalt. ca. 105. Bro. Parliament 55. 5 Ed. 4. 6. a.

Sect. 2. Offences of this Nature are not any way mitigated, by ſhewing that the Woman at laſt yielded to the Violence, if ſuch her Conſent was forced by Fear of Death, or of Dureſs: Nor is it any Excuſe, that ſhe conſented after the Fact, or that ſhe was a common Strumpet; for ſhe is ſtill under the Protection of the Law, and may not be forced. But it was anciently ſaid, to be no Rape to force a Man's own Concubine. Alſo it hath been ſaid by ſome to be no Rape to force a Woman who conceives at the Time; for it is ſaid, That if ſhe had not conſented, ſhe could not have conceived: But this Opinion ſeems very queſtionable, not only becauſe the previous Violence is no way extenuated by ſuch a ſubſequent Conſent, but alſo becauſe if it were neceſſary to ſhew that the Woman did not conceive, the Offender could not be tried till ſuch Time as it might appear whether ſhe did or not, and likewiſe becauſe the Philoſophy of this Notion may very well be doubted of. [47]

Ruſhworth's Coll. Part 2. Vol. I. 100. Bract. 147.

S. P. C. 24. Bract. 148. Finch 204. Dal. cap. 107.

1 H. H. P. C. 633. Ruſhworth's Coll. Part 2. Vol. I. 100. Bract. 147. a. Dalt. ca. 107. Crom. 100. a. Dy. 304. Pl. 51. Cro. Ca. 332.

Sect. 3. It is a ſtrong, but not a concluſive Preſumption againſt a Woman, That ſhe made no Complaint in a reaſonable Time after the Fact.

Sect. 4. It was a Queſtion before 18 *El.* 7. Whether a Rape could be committed on a Child of the Age of ſix or ſeven Years; but by that Statute, *whoſoever ſhall unlawfully and carnally know and abuſe any Woman-Child under the Age of ten Years, ſhall ſuffer as a Felon without Clergy.*

Sect. 5. Upon an Indictment for this Offence, it is no way material whether ſuch Child conſented, or were forced; yet it muſt be proved, That the Offender entered into her Body, *&c.*

B. 2. Ch. 29. Sect. 7, 89. Dalt. ca. 107.

Sect. 6. All who are preſent and actually aſſiſt a Man to commit a Rape, may be indicted as principal Offenders, whether they be Men or Women.

Sect. 7. As to the ſecond Point, *viz.* How Rape is puniſhed, it is ſaid, that of old Time it was Felony, and conſequently puniſhable with Death, eſpecially if the Party raviſhed were a Virgin, unleſs ſuch Virgin would accept of the Offender for her Husband, in which Caſe ſhe might ſave his Life by marrying him. But afterwards it was looked upon as a great Miſdemeanour only, but not Felony; and the Offender was puniſhed with the Loſs of his Eyes and Teſticles: And by the Statute of *Weſtm.* 1. 13. It was reduced to a Treſpaſs, ſubjecting the Offender to two Years Impriſonment, and a Fine at the King's Will. But the Smallneſs of the Puniſhment proving a great Encouragement to the Offence, it was made Felony again, by the Statute of *Weſtminſter* 2. 34. and by 18 *El.* 7. it is excluded from the Benefit of Clergy.

1 H. H. P. C. 627. Bract. 147, 148. S. P. C. 21. b. 22, 23. 2 Inſt. 181. Dalt. cap. 99. Crom. 32. con. Co. Li. 123. b. Fleta lib. 1. cap. 40. 3 Inſt. 180. Quære Fitz. Utlagary 49. Bro. Coro. 169.

CHAP. XLII.

Of Forcible Marriage.

Sect. 1. THE marrying a Woman of Subſtance by Force, and other Offences of the like Nature, were made Felonies by 3 *H.* 7. 2. which was enacted in the following Words:

Sect. 2. *Where Women as well Maidens as Widows and Wives, having Subſtances, ſome in Goods moveable, and ſome in Lands and Tenements, and ſome being Heirs Apparent unto their Anceſtors, for the Lucre of ſuch Subſtances, be oftentimes taken by Miſ-doers, contrary to their Will, and after married to ſuch Miſ-doers, or to other by their Aſſent, or defiled, to the great Diſpleaſure of God, and contrary to the King's Laws, and Diſparagement of the ſaid Women, and utter Heavineſs and Diſcomfort of their Friends, and to the evil Enſample of all other: It is therefore ordained, eſtabliſhed and enacted by our Sovereign Lord the King, by the Advice of the Lords Spiritual and Temporal, and the Commons in the ſaid Parliament aſſembled, and by the Authority of the ſame, That what Perſon or Perſons from henceforth, that taketh any Woman (ſo) againſt her Will unlawfully, that is to ſay, Maid, Widow, or Wife, that ſuch Taking, Procuring, and Abetting to the ſame, and alſo receiving wittingly the ſame Woman ſo taken againſt her Will, and knowing the ſame, be Felony: And that ſuch Miſ-doers, Takers, and Procurators to the ſame, and Receitors, knowing the ſaid Offence in Form aforeſaid, be henceforth reputed and judged as principal Felons: Provided alway, that this Act extend not to any Perſon taking any Woman, only claiming her as his Ward or Bond-Woman.*

Sect. 3. And by 39 *El.* 9. *All Perſons who ſhall be Principals, or Procurers or Acceſſaries before ſuch Offence committed, are excluded from the Benefit of the Clergy.*

See 1 H. H. P. C. 660, 661. and Swendſen's Caſe, St. Tr. Vol. 5. p. 468. Far. 101, 102. Hob. 182. Cro. Ca. 485. Daliſ. 22. 1 And. 115. 3 Inſt. 61. H. P. C. 118. Savil 59. 12 Co. 20, 110.

In the Conſtruction of the ſaid Statute or 3 *H.* 7. 2. the following Points have been reſolved.

Sect. 4. I. That the Indictment muſt expreſly ſet forth, both that the Woman taken away had Land or Goods, or was Heir apparent, and alſo that ſhe was married or defiled, becauſe no other Caſe is within the Preamble of the Statute, to which the enacting Clauſe clearly refers; for it does not ſay, That what Perſon, *&c.* that taketh any Woman againſt her Will, but what Perſon that taketh any Woman *ſo* againſt her Will.

Sect. 5. II. That the Indictment ought alſo to alledge, That the taking was for Lucre, becauſe the Words of the Preamble are ſo, but that it needs not ſet forth, That it was with an Intention to marry or defile the Party, becauſe the Words of the Statute neither require ſuch an Intention, nor does the Want thereof any way leſſen the Injury.

Hob. 182. Cro. Ca. 485, 489.

Sect. 6. III. That it is no manner of Excuſe, That the Woman at firſt was taken away with her own Conſent, becauſe if ſhe afterwards refuſe to continue with the Offender, and be forced againſt her Will, ſhe may from that Time as properly be ſaid to be taken againſt her Will, as if ſhe had never given any Conſent at all; for till the Force was put upon her, ſhe was in her own Power.

Hob. 182. Cro. Ca. 485.

Sect. 7. IV. That it is not material whether a Woman ſo taken away, be at laſt married, or defiled, with her own Conſent or not, if ſhe were under the Force at the Time, becauſe the Offender is in both Caſes equally within the Words of the Statute, and ſhall not be conſtrued to be out of the Meaning of it, for having prevailed over the Weakneſs of a Woman, whom by ſo baſe Means he got into his Power.

Cro. Ca. 493. 3 Keb. 193. 2 Vent. 243, 244.

Sect. 8. V. That thoſe who after the Fact receive the Offender, but not the Woman, are not Principals within this Statute, becauſe the Words are, *receiving wittingly the ſame Woman ſo taken*, &c. but it ſeems clearly, That they are Acceſſaries after the Offence, according to the known Rules of Common Law.

3 Inſt. 61. Daliſ. 22. S. P. C. 44. Far. 132.

Sect. 9. VI. That thoſe who are only privy to the Marriage, but no way Parties to the Forcible taking away, or conſenting thereto, are not within the Statute.

Cro. Ca. 482. H. P. C. 119.

Sect. 10. VII. That where a Woman is taken by Force in the County of *A.* and married in the County of *B.* the Offender may be indicted and found guilty in the County of *B.* becauſe the continuing of the Force there amounts to a Forcible Taking within the Statute.

Cro. Ca. 488. Hob. 183. H. P. C. 119.

CHAP. XLIII.

Of Offences againſt the Rights of Marriage.

Sect. 1. OFFENCES againſt the Rights of Marriage, at Common Law, are looked upon as Spiritual Offences, and puniſhable only by the Eccleſiaſtical Law, but one of them is made Felony, but not excluded from the Benefit of the Clergy, by 1 *Jac.* 1. 11. by which it is enacted, *That if any Perſon or Perſons, within his Majeſty's Dominions of* England *and* Wales, *being married, do marry any Perſon or Perſons, the former Husband or Wife being alive, that then every ſuch Offence ſhall be Felony, and the Perſon and Perſons ſo offending, ſhall ſuffer Death as in Caſes of Felony. And the Party and Parties ſo offending, ſhall receive ſuch and the like Proceeding, Trial, and Execution, in ſuch County, where ſuch Perſon or Perſons ſhall be apprehended, as if the Offence had been committed in ſuch County, where ſuch Perſon or Perſons ſhall be taken or apprehended.*

Cro. El. 94.

Sect. 2. But it is provided by the ſaid Statute, *That nothing therein contained, ſhall extend to any Perſon or Perſons whoſe Husband or Wife ſhall be continually remaining beyond the Seas by the Space of ſeven Years together, or whoſe*

Husband or Wife ſhall abſent him or her ſelf, the one from the other, by the Space of ſeven Years together in any Parts within his Majeſty's Dominions, the one of them not knowing the other to be living within that Time.

Sect. 3. And it is farther provided, *That the ſaid Statute ſhall not extend to any Perſon or Perſons who ſhall be at the Time of ſuch Marriage divorced by Sentence in the Eccleſiaſtical Court, or to any Perſon or Perſons where the former Marriage ſhall be by Sentence in the Eccleſiaſtical Court declared to be void and of no effect: Nor to any Perſon or Perſons, for, or by Reaſon of, any former Marriage had or made within Age of Conſent.*

Sect. 4. Alſo it is farther provided, *That no Attainder for this Offence ſhall make or work any Corruption of Blood, Loſs of Dower, or Diſinheriſon of Heir or Heirs.*

In the Conſtruction of this Statute it has been holden,

See 1 H. H. P. C. 692 to 694.

Sect. 5. I. That not only thoſe who are divorced *à vinculo Matrimonii*, but alſo thoſe who are divorced only *à Menſa & Thoro Cauſa Adulterii* or *Sævitiæ*, are within the Exception in this Statute, notwithſtanding there be not the Word *Divortiamus*, but only the Word *Separamus*, in the Sentence; becauſe the Statute, being penal, ſhall be conſtrued favourably, and ſuch Separations are taken for Divorces in common Underſtanding. [58]

3 Inſt. 89. H. P. C. 122. Kelynge 27. Cro. Ca. 461, 462. This is made a Quære.

Sect. 6. II. Where either of the Parties were within the Age of Conſent at the Time of the firſt Marriage, that not only ſuch Perſon as was within ſuch Age, but alſo the other who was above it, is within the Exception of the Statute, becauſe the Power of diſagreeing to ſuch Marriage is equal on both Sides.

3 Inſt. 89. H. P. C. 121. 1 Rol. Ab. 340. Pl. 13, 141. Pl. 14, 15, 16, 17. Co. Lit. 79.

Sect. 7. III. That if the firſt Marriage were beyond Sea, and the latter in *England*, the Party may be indicted for it here, becauſe it is the latter Marriage that makes the Offence; but if the firſt Marriage were in *England*, and the latter beyond Sea, it is ſaid that the Offender cannot be indicted here; *ſed Quære*, why not? for the Words of the Statute are, *That the Parties ſo offending ſhall receive ſuch and the like Proceeding, Trial, and Execution, in ſuch County where ſuch Perſon or Perſons ſhall be apprehended, as if the Offence had been committed in ſuch County, where ſuch Perſon or Perſons ſhall be taken or apprehended.*

1 H. H. P. C. 692. 1 Sid. 171. Kelynge 80.

CHAP. XLIV.

Of Offences againſt the Members of a Man's Body.

IN treating of Offences againſt the Members of a Man's Body, I ſhall conſider,

1. What Offences of this Nature are eſteemed Maims.
2. How they are puniſhed by the Common Law.
3. How they are puniſhed by Statute.

Fleta. lib. c. 40. Brit. 48. Bract. 144. b. 145.

Sect. 1. As to the firſt Point, it ſeems that ſuch a Hurt of any Part of a Man's Body, whereby he is rendered leſs able in Fighting, either to defend himſelf or annoy his Adverſary, is properly Maim.

S. P. C. 38. b. Co. Lit. 126, 128. 3 Inſt. 62, 118.

Sect. 2. And therefore the cutting off, or diſabling, or weakening a Man's Hand or Finger, or ſtriking out his Eye or Foretooth, or caſtrating him, are ſaid to be Maims, but the cutting off his Ear, or Noſe,

Fitz. Coro. 142, 458. 25 Ed. 3. 94. See the Authors above cited.

Noſe, &c. are not eſteemed Maims, becauſe they do not weaken, but only disfigure him.

Bract. 144. b. Fleta lib. 1. cap. 40. S. P. C. 37. a. 3 Inſt. 62, 118. H. P. C. 133.

Sect. 3. As to the ſecond Point, *viz.* How ſuch Offences are to be puniſhed, it is to be obſerved, that all Maim is Felony; and it is ſaid, That anciently Caſtration was puniſhed with Death, and other Maims with the Loſs of Member for Member; but afterwards no Maim was puniſhed in any Caſe with the Loſs of Life or Member, but only with Fine and Impriſonment.

See 5 H. 4. c. 5.

Sect. 4. As to the third Point, *viz.* How ſuch Offences are puniſhed by Statute, it is enacted by 22 and 23 *Ca.* 2. cap. 1. *That if any Perſon ſhall on Purpoſe and of Malice fore-thought, and by lying in wait, unlawfully cut out, or diſable, the Tongue, put out an Eye, ſlit the Noſe, cut off a Noſe, or Lip, or cut off or diſable any Limb, or Member of any ſubject of his Majeſty, with Intention in ſo doing to maim or diſfigure, in any the Manners before mentioned, ſuch his Majeſty's Subject, That then and in every ſuch Caſe the Perſon or Perſons ſo offending, their Counſellors, Aiders and Abettors, knowing of, and privy to the Offence, as aforeſaid, ſhall be and are by the ſaid Statute declared to be Felons, and ſhall ſuffer Death as in Caſes of Felony without Benefit of Clergy.*

Sect. 5. But it is provided by the ſaid Statute, *That no Attainder of ſuch Felony ſhall extend to corrupt the Blood, or forfeit the Dower of the Wife, or the Lands, Good or Chattels of the Offender.*

Woodburn and Coke's Caſe at the Suffolk Aſſizes, 8 Geo. 1. ſee the St. Tr. Vol. 6. p. 212.

Sect. 6. If a Man attack another of Malice fore-thought, in order to murder him with a Bill, or any other ſuch like Inſtrument, which cannot but endanger the Maiming him, and in ſuch Attack happen not to kill, but only to maim him, he may be indicted on this Statute, together with all thoſe who were his Abettors, &c. and it ſhall be left to the Jury on the Evidence, whether there were a Deſign to murder by maiming, and conſequently a malicious Intent to maim as well as to kill, in which Caſe the Offence is within the Statute, tho' the primary Intention was Murder.

CHAP. XLV.

Of Offences againſt Records.

3 Inſt. 71, 72. 1 H. H. P. C. 646 to 648.

Sect. 1. AT Common Law the imbezilling, defacing, or altering any Record, without due Authority, was an Offence highly puniſhable by Fine and Impriſonment, &c. and in many Caſes it was made Felony by the following Clauſe of 8 *H.* 6. 12.

Sect. 2. *It is ordained, That if any Record or Parcel of the ſame, Writ, Return, Panel, Proceſs, or Warrant of Attorney, in the King's Courts of Chancery, Exchequer, the one Bench or the other, or in his Treaſury, be willingly ſtoln, taken away, withdrawn, or avoided, by any Clerk, or by other Perſon, becauſe whereof any Judgment ſhall be reverſed: That ſuch Stealer, Taker-away, Withdrawer, or Avoider, their Procurators, Counſellors, and Abettors, thereof indicted, and by Proceſs thereupon made, thereof duly convict by their own Confeſſion, or by Inqueſt to be taken of lawful Man, (whereof the one half ſhall be of the Men of any Court of the ſame Courts, and the other half of other) ſhall be judged for Felons, and ſhall incur the Pain of Felony: And that the Judges of the ſaid Courts, of the one Bench or of the other, have Power to hear and determine ſuch Defaults before them, and thereof to make due Puniſhment, as afore is ſaid.*

In the Conſtruction of this Clauſe, it hath been holden: 3 Inſt. 71.

Sect. 3. I. That it extends only to the Courts which are expreſly na- 1 H. H. P. C.
ed; and to the Court of Chancery, ſo far only as it proceeds according 649 to 652.
the Courſe of the Common Law.

Sect. 4. II. That it extends not to ſuch Offence by the Judges of any 3 Inſt. 72.
ourt; for whereas it begins with expreſly naming Clerks which are inferior
them, it ſhall not be intended to include them under the general Words
llowing; however by 8 *R.* 2. 4. *Judges as well as Clerks are to pay*
Fine to the King, and make Satisfaction to the Party for falſly entring 2 R. 3. 10.
leas, or raſing Rolls, or changing Verdicts to the Diſheriſon of any one; And 3 Mod. 66.
ey are highly puniſhable at Common Law for other Offences of like Na- Bro. Cor. 174.
re, as for inſerting a Bill of Indictment not found by the Jury among Tref. 31.
oſe which were found, and ſuch like. And Juſtice *Ingham* in the Reign Con. Bro.
Edward the firſt was fined eight hundred Marks for raſing a Fine of Preſentment
irteen Shillings and four Pence, ſet on a poor Man, and making it ſix Shil- 23. Indict-
ngs and eight Pence. ment 14, 50.
3 Inſt. 72.

Sect. 5. III. That not only ſuch an Alteration whereby a Judgment is
tually reverſed, but alſo ſuch whereby it is reverſible, whether it were
ade before or after the Judgment was given, or whether it be or be not
fterwards amended by the Court, is within this Act; for thoſe Words 2 Rol. Re. 81.
the Statute *whereby any Judgment ſhall be reverſed*, are taken to have
e ſame Purport, as if it were ſaid, whereby any Judgment ſhall be an-
ulled, or loſe its Force or Effect; for it is plain, That the Statute can-
ot intend that the Judgment muſt be actually reverſed by Writ of Error,
ecauſe it ſpeaks of ſtealing or carrying away, or avoiding of Records,
hich makes it impoſſible that the Judgment ſhould be reverſed at all,
ecauſe no Writ of Error can remove a Judgment which appears not.
nd it has been holden, That if *A. B.* be outlawed by the Name of *A. C.* 2 R. 3. 10.
nd afterwards the Record be raſed, and *A. B.* inſerted, the Offence is S. P. C. 36. b.
ithin the Statute, becauſe the Record againſt *A. C.* is annulled, and the 3 Inſt. 72.
udgment prevented, which might have been given on a Writ of Error 11 Rep. 34. b.
or this Defect.

Sect. 6. IV. If the Offence were committed partly in one County, and 2 R. 3. 10. b.
partly in another, but not ſo as to amount to a compleat Offence within the 11.
Statute in either, That the Party cannot be indicted for a Felony, becauſe S. P. C. 36.
he Counties cannot join in an Indictment, and that which is done in one 3 Inſt. 73.
annot be found in another, but that he may be indicted for a Miſpriſion
n either County.

Sect. 7. V. That the Act, by making thoſe who are Acceſſary before 3 Inſt. 72.
he Fact principal Felons, does not mean any way to favour thoſe who are Con S. P. C.
Acceſſary after, but to leave them to the general Conſtruction of the Law. 44. d.

Sect. 8. VI. That by the laſt Clauſe of the Act, the Juſtices of either 3 Inſt. 73.
Bench have a concurrent Authority, and that they which ſhall firſt enquire
ſhall proceed; and that if the Offence were committed in the County
where the Benches ſit, they need no other Commiſſion; but if it were
done in another County, that they muſt have a ſpecial Commiſſion: And 3 Inſt. 72.
f in *London*, that they ſhall have a Commiſſion in which the Mayor ſhall 2 R. 3. 11. a.
e omitted, for the Charters of the City, which require that he ſhall be
Principal in every Commiſſion, extend not to ſuch Cauſes which are ſpe-
ially limited to particular Judges.

Sect. 9. By 21 *Jac.* 1. 26. *It is made Felony without the Benefit of Clergy,*
ut not ſo as to corrupt the Blood, to acknowledge or procure to be acknowledged,
ny Fine, Recovery, Deed enrolled, Statute, Recognizance, Bail, or Judgment
n the Name of any other Perſon or Perſons not privy or conſenting to the ſame.

2 Jon. 64. Contra in the Report of the ſame Caſe. 1 Ven. 301, 302. 1 Ven. 302.

Sect. 10. In the Conſtruction hereof it has been holden, That if a Man perſonate another in the County of *A.* in putting in Bail before a Judge, and the Bail be filed in the County of *B.* the Trial ſhall be in the County of *A.* Alſo it ſeems the bare perſonating of Bail before a Judge is no Felony, unleſs the Bail be filed. [49]

Sect. 11. Alſo it is enacted by 4 & 5 *Will. & Mar.* 4. *That any Perſon or Perſons who ſhall before any Commiſſioner authorized to take Bail, by Virtue of the ſaid Statute, in Actions depending in the Courts of King's Bench, Common Pleas, or Exchequer, repreſent, or perſonate any other Perſon or Perſons, whereby the Perſon or Perſons ſo repreſented and perſonated, may be liable to the Payment of any Sum or Sums of Money, or Debt, or Damages, to be recovered in the ſame Suit or Action, wherein ſuch Perſon or Perſons are repreſented and perſonated, as if they had really acknowledged and entered into the ſame, being lawfully convicted thereof, ſhall be adjudged Felons.*

CHAP. XLVI.

Of Offences relating to Cattle.

BY 22 & 23 *Car.* 2. 7. it is made Felony, *Maliciouſly, unlawfully, and willingly, to kill or deſtroy any Horſes, Sheep, or other Cattle of any Perſon or Perſons whatſoever in the Night-time, but Liberty is given to the Offender to avoid Judgment of Death, by chuſing Judgment of Tranſportation for ſeven Years; and any three Juſtices of Peace for the County, Diviſion, City, Town-corporate, or Place, whereof one to be of the* Quorum, *are authoriſed to enquire as well by the Oaths of twelve lawful Men, of the ſame County, as by Examination of Witneſſes upon Oath, or by any lawful Ways or Means, which to them ſhall ſeem meet, of the ſaid Offences, and in order thereunto to iſſue out Warrants, as well for the Summoning of Jurors, as for the apprehending of all Perſons, who ſhall or may be ſuſpected thereof, and to take their Examination touching the ſame, as alſo to cauſe all ſuch other Perſons as to them ſhall ſeem likely to make Diſcovery thereof, to appear before them, and to give Information upon Oath concerning their Knowledge of the Premiſſes, ſo as no Perſon ſo to be examined ſhall in any wiſe be proceeded againſt for any Offence concerning which he ſhall be ſo examined as a Witneſs, and ſhall upon ſuch his Examination make a true Diſcovery of: And if any Perſon who ſhall be thought likely to make ſuch Diſcovery, being ſummoned by the ſaid Juſtices, refuſe to appear, or to be examined as a Witneſs, he may be committed by the ſaid Juſtices to the County-Gaol, till he ſhall ſubmit to be examined. Provided, That no Perſon ſhall be queſtioned for any Offence againſt the Statute, unleſs he be proceeded againſt within ſix Months after the Offence committed.*

by 14. G. 2. c. 6. & 15. G. 2. c. 34. Stealing one or more sheep, bulls, cows, Oxen, Steers, Bullocks, Heifers, Calves or Lambs, or any part of y^m. is Felony without Clergy.

CHAP. XLVII.

Of Offences by Purveyors.

4 Inſt. 543. *Sect.* 1. ANciently the King's Court was ſupplied with Neceſſaries from the ancient Demeſnes of the Crown, which were manured for that Purpoſe, and in reſpect thereof the Tenants of thoſe Lands had many Privileges, which they ſtill enjoy; but this Method being found to be

e troubleſome and inconvenient, was by Degrees diſuſed, and afterwards he King uſed to appoint certain Officers to buy in Proviſions for his Houſhold, who were called Purveyors, and claimed many Privileges by the Prerogative of the Crown, and ſeem to have had the Pre-emption of all ſuch Victuals as were bought by any one to ſell again. Noy 101.

Sect. 2. By *Magna Charta*, chap. 21. *The King ſhall not take the Timber of any Perſon againſt his Will, and by many ſubſequent Statutes, ſeveral Offences of Purveyors were made Felonies, as if they took Things above the Value of twelve Pence againſt the Will of the Owner, without Warrant, or without ſuch Appraiſement as was directed by thoſe Statutes, or without paying for them*, &c. 28 E. 1. ch. 2. 36 E. 3. ch. 2, 3, 4, 5, 6. 5 E. 3. ch. 2. 2 Inſt. 82. Dalt. ca. 107. Crom. 48.

Sect. 3. But theſe Laws having been found by Experience not to have ſufficiently provided againſt the Oppreſſions of *Perſons imployed for making Proviſions for the King's Houſhold, Carriages, and other Purveyance for his Majeſty*, and ſeveral Counties having found themſelves obliged to ſubmit to ſundry Rates and Taxes, and Compoſitions to redeem themſelves from ſuch Vexations and Oppreſſions, as it is recited by 12 *Car.* 2. 24. Par. 12. it was enacted by the ſaid Statute, *That from thenceforth no Sum or Sums of Money, or other Thing ſhall be taken, raiſed, taxed, rated, impoſed, paid, or levied, for or in regard of any Proviſion, Carriages, or Purveyance for his Majeſty, his Heirs or Succeſſors.* 1 Bulſt. 96, 97. See Mo. 762, 770, 778. Noy 101. 1 H. H. P. C. 644.

Sect. 4. And it is farther enacted by the ſaid Statute, Par. 13. *That no Perſon or Perſons by any Warrant, Commiſſion, or Authority under the Great Seal, or otherwiſe by Colour of buying or making Proviſion or Purveyance for his Majeſty, or any Queen of* England *for the Time being, or of any the Children of any King or Queen of* England *for the Time being, or that ſhall be, or for his, their, or any of their Houſhold, ſhall take any Timber, Fuel, Cattle, Corn, Grain, Malt, Hay, Straw, Victual, Cart, Carriage, or other Thing whatſoever, of any the Subjects of his Majeſty, his Heirs, or Succeſſors, without the free and full Conſent of the Owner or Owners thereof, had and obtained without Menace or Enforcement; nor ſhall ſummon, warn, take, uſe, or require any the ſaid Subjects to furniſh or find any Horſes, Oxen, or Cattle, Carts, Ploughs, Wains, or other Carriages, for the Uſe of his Majeſty, his Heirs or Succeſſors, or of any Queen of* England, *or of any Child, or Children of any of the Kings or Queens of* England *for the Time being, for the carrying the Goods of his Majeſty, his Heirs or Succeſſors, or the ſaid Queens, or Children, or any of them, without ſuch full and free Conſent as aforeſaid, any Law, Statute, Cuſtom, or Uſage to the contrary notwithſtanding.*

Sect. 5. And it is farther enacted Par. 14. *That no Pre-emption ſhall be allowed or claimed in the Behalf of his Majeſty, or of any of his Heirs or Succeſſors, or of any of the Queens of* England, *or of any of the Children of the Royal Family, for the Time being, in Market or out of Market, but that it be free to all and every the Subjects of his Majeſty, to ſell, diſpoſe, or employ his ſaid Goods to any other Perſon or Perſons, as him liſteth, any Pretence of making Proviſion or Purveyance of Victual, Carriages or other Thing for his Majeſty, his Heirs or Succeſſors, or of the ſaid Queens, or Children, or any Pretence of Pre-emption in their, or any of their Behalfs notwithſtanding. And if any Perſon or Perſons ſhall make Proviſion or Purveyance for his Majeſty, his Heirs or Succeſſors, or any the Queens, or Children aforeſaid, or impreſs, or take any ſuch Carriages, or other Things aforeſaid, on any Pretence or Colour of any Warrant aforeſaid, under the Great Seal, or otherwiſe, contrary to the Intent hereof, it ſhall be lawful for the Juſtices of Peace, or ſuch two, or one of them as dwell near, and to the Conſtables of ſuch Pariſh or Village where ſuch Occaſion ſhall happen, at the Requeſt of the Party grieved, to commit or cauſe to be committed, the Party or Parties ſo doing and offending, to Gaol, till the next Seſſions, there to be indicted and proceeded againſt for the ſame*, &c.

Sect. 6.

Sect. 6. But this abſolute and univerſal Reſtraint of all Kinds of Purveyance having been found by Experience inconvenient, it was enacted by 13 & 14 *Car.* 2. 20. which has been often continued by ſubſequent Statutes, That the Officers of the Navy may preſs Carriages for the Uſe of his Majeſty's Navy and Ordnance, according to the Regulations preſcribed by that Statute, and the like was enacted by 1 *Jac.* 2. 10. in relation to the King's Royal Progreſſes, &c.

CHAP. XLVIII.

Of Offences by Soldiers and Mariners.

OFFENCES by Soldiers or Mariners, made Felony by Statute, are of three Kinds.

1. Wandering without a Teſtimonial.
2. Departing from the King's Service without Licence.
3. Deſtroying a Ship.

Sect. 1. The firſt of theſe Offences depends upon 39 *El.* 17. by which it is recited, *That divers licentious Perſons contemning both Laws, Magiſtrates, and Religion, had uſed to wander up and down in all Parts of the Realm, under the Name of Soldiers and Mariners, abuſing the Title of that honourable Profeſſion, to countenance their wicked Behaviours, and that ſuch Perſons had uſed to aſſemble themſelves weaponed in the Highways, and elſewhere in Troops, to the great Terror and Aſtoniſhment of her Majeſty's true Subjects, the Impeachment of her Laws, and the Diſturbance of the Peace and Tranquility of this Realm: And that many hainous Outrages, Robberies, and horrible Murders had been daily committed by ſuch diſſolute Perſons*; And thereupon it is enacted, *That all idle and wandering Soldiers or Mariners, or idle Perſons which ſhall be wandering as Soldiers or Mariners, ſhall ſettle themſelves in ſome Service, Labour, or other lawful Courſe of Life, without wandering, or otherwiſe repair to the Places where they were born, or to their Dwelling-Places, if they have any, and there remain, betaking themſelves to ſome lawful Trade or Courſe of Life, as aforeſaid; upon Pain, That all Perſons offending contrary to this Act, ſhall ſuffer as in caſe of Felony, without Clergy.*

Sect. 2. And it is farther enacted, *That every idle and wandering Soldier or Mariner, which, coming from his Captain from the Seas, or from beyond the Seas, ſhall not have a Teſtimonial under the Hand of ſome one Juſtice of the Peace, of, or near, the Place where he landed, ſetting down therein the Place and Time, where and when he landed, and the Place of his Dwelling or Birth, unto which he is to paſs as aforeſaid, and a convenient Time therein limited for his Paſſage, or having ſuch Teſtimonial, ſhall wilfully exceed the Time therein limited, above fourteen Days: And alſo, as well every ſuch idle and wandering Soldier or Mariner, as every other idle Perſon wandering, as Soldier or Mariner, which ſhall at any Time hereafter forge or counterfeit any ſuch Teſtimonial, or have with him or them any ſuch Teſtimonial forged, or counterfeited as aforeſaid, knowing the ſame to be counterfeited or forged, in all theſe Caſes, every ſuch Act or Acts to be Felony, and the Offenders to ſuffer, as aforeſaid, without any Benefit of Clergy.*

Sect. 3. And it is farther enacted, *That it ſhall be lawful for the Juſtices of Aſſizes, Juſtices of Gaol-Delivery, and the Juſtices of Peace of every County, and all Juſtices of Peace in Towns corporate, having Authority to hear and determine Felonies, to hear and determine all ſuch Offences in their general Seſſions, and to execute the Offenders, which ſhall be convicted before them, as in Caſes of Felony is accuſtomed, except ſome honeſt Freeholder,* &c. *will take ſuch Offender into his Service for one whole Year, and alſo be bound by Recognizance of ten Pounds, to keep the ſaid Perſon for one whole Year, and bring him to the next Seſſions for the Peace and Gaol-Delivery next enſuing after the ſaid Year; and if any ſuch Perſon ſo retained, depart within the Year, without the Licence of him that ſo retained him, then, to be indicted, tried, and judged as Felon, and not to have the Benefit of the Clergy.*

Sect. 4. But it is provided by the ſaid Statute, *That if any ſuch idle and wandring Perſon, as aforeſaid, ſhall happen to fall ſick by the Way, ſo that by reaſon of his Weakneſs he cannot travel to his Journey's End within the Time limited within his Teſtimonial, no ſuch Perſon to be within the Danger of this Statute, ſo as he ſettle himſelf in ſome lawful Courſe of Life, as aforeſaid, or repair, as aforeſaid, to the Place where he was born, or was laſt abiding, within convenient Time after the Recovery of his Sickneſs, and there remain as aforeſaid.*

Sect. 5. And it is farther provided by the ſaid Statute, *That if ſuch Soldier or Mariner repairing to his Place of Birth,* &c. *cannot get work, he ſhall be ſet to work by two Juſtices of Peace,* &c.

Sect. 6. And it is farther provided, *That if ſuch Soldier or Mariner repart to ſome Juſtice of the Peace next adjoining to his Place of Landing, or to ſuch his direct Way home, and make known unto the ſaid Juſtice his Poverty; that the ſaid Juſtice, upon perfect Notice thereof had, may licence the ſame Soldier or Mariner to paſs the next and direct Way to the Place where he is to repair, and to limit him ſo much Time only, as ſhall be neceſſary for his Travel thither; and that in ſuch caſe his Licence being ſo made, and he purſuing the Form of ſuch his Licenſe, ſhall and may, for his neceſſary Relief in his Travel, aſk and take the Relief that any Perſon ſhall willingly give him.*

Sect. 7. The ſecond Offence of this Kind, *viz.* That of departing from the King's Service without Licence, depends upon ſeveral Statutes; for it was enacted by 18 *H.* 6. 19. *that Soldiers retained in the manner prescribed by that Act, departing from their Captains without Licence, ſhall be guilty of Felony*; but this Statute is now of little uſe, becauſe the Method of retaining Soldiers therein referred to, is diſuſed. [50]

3 Inſt. 86. 6 Co. 27. Co. Lit. 71. Dalt. ca. 107. Cro. Ca. 71. Hutt. 134.

Sect. 8. However by 7 *H.* 7. 1. and 3 *H.* 8. 5. ſtill in Force, *If any Soldier, being no Captain, immediately retained with the King, who ſhall be in Wages and retained, or take any Preſt to ſerve the King upon the Sea, or upon the Land beyond the Sea, depart out of the King's Service, without Licence of his Captain, he ſhall ſuffer as a Felon, without the Benefit of the Clergy. And all Juſtices of Peace in every ſhire in* England, *where any ſuch Offenders be taken, have Power to enquire of the ſaid Offences, and the ſame to hear and determine, as they may do of Felony, Treſpaſſes, and of other Offences expreſſed in the King's Commiſſion to them made, as though the ſaid Offences were done in the ſame Shire.*

3 Inſt. 86. Dalt. ca. 107. 2 And. 151. 3 Mod. 124. See alſo the other Books above cited, and 1 H. H. P. C. 672 to 680.

Sect. 9. And by 2 *Ed.* 6. 2. *If any Soldier, ſerving the King in his Wars, in any his Dominions, or on the Seas, or beyond the Seas, or in* Scotland, *depart without Licence of the Lieutenant, or Admiral, or Captain,* &c. *with Booty, or otherwiſe, being in the Enemy's Country, or elſewhere in the King's Service, or out of any Garriſon where he ſhall be appointed to ſerve, he ſhall be adjudged a Felon, and excluded from his Clergy; and the Juſtices of eve-*

3 Inſt. 86. 6 Co. 67.

ry Shire where ſuch Offender ſhall be taken, may enquire of and determine th Offence, &c.

Sect. 10. The third Offence of this Kind, *viz.* That of deſtroying a Ship, depends upon 22 & 23 Car. 2. 11. and 1 *Annæ*, St. 2. c. 9. by which it is enacted, *That if any Captain, Maſter, Mariner or other Officer, belonging to any Ship, ſhall wilfully caſt away, burn, or otherwiſe deſtroy the Ship to which he belongeth, or procure the ſame to be done, to the Prejudice of the Owner or Owners thereof, or of any Merchant or Merchants that ſhall load Goods thereon, he ſhall ſuffer as a Felon, without the Benefit of Clergy, and if the Offence were committed in the Admiral's Juriſdiction, ſhall be tried in the Manner preſcribed by* 28 H. 8. 15. [51] [52]

CHAP. XLIX.

Of Offences by Hunters.

3 Inſt. 76, 77. Dal. ca. 29. 1 H. H. P. C. 656 to 659.

IT is recited by 1 *H.* 7. 7. *That many great Outrages, Murders, Inſurrections and Rebellions had often been occaſion'd by Perſons in great Numbers, with painted Faces, Viſors, and otherwiſe diſguiſed, and riotouſly, and in manner of War arrayed, hunting as well by Night as by Day*; and thereupon it is enacted, *That as often as Information ſhall be made of any ſuch unlawful Huntings by Night, or with painted Faces, to any of the King's Council, or to any Juſtice of Peace of the County, of any Perſon ſuſpected thereof, any of the ſame Council, or Juſtices, to whom ſuch Information ſhall be made, may make a Warrant to arreſt ſuch Perſon, and may alſo examine him of the ſaid Huntings, and of the ſaid Doers in that Behalf; and if the ſame Perſon wilfully conceal the ſaid Huntings, or any Perſon with him defective therein, that then the ſame Concealment be Felony; and if he then confeſs the Truth, and all that he ſhall be examined of, and knoweth in that behalf, that then the ſaid Offences of Huntings be againſt the King but Treſpaſs finable, by Reaſon of the ſame Confeſſion, at the next general Seſſions of the Peace to be holden in the ſame County, by the King's Juſtices of the ſame Seſſions, there to be ſeſſed. And if any Reſcous or Diſobedience be made to any Perſon, having Authority to do Execution or Juſtice, by any ſuch Warrant, by any Perſon, the which ſo ſhould be arreſted, ſo that the Execution of the ſame Warrant thereby be not had, that then the ſame Reſcous and Diſobedience, be Felony; and if any Perſon or Perſons ſhall be convict of any ſuch Huntings, with painted Faces, Viſors, or otherwiſe diſguiſed, to the Intent they ſhould not be known, or of unlawful Hunting in Time of Night, that then the ſame Perſon or Perſons ſo convict, to have like Punition, as he or they ſhould have, if he or they were convict of Felony.*

CHAP.

CHAP. L.

Of Offences by Forgers of False Deeds.

BY 5 *El.* chap. 14. *If a Man be convict or condemned of forging or publishing a forged Deed, and after such Conviction or Condemnation, do commit the like Offence, he is made guilty of Felony, and excluded from the Benefit of Clergy*; as shall more fully be shewn in the Chapter of *Forgery*. 1 H. H. P. C. 682 to 686.

CHAP. LI.

Of Offences by Gaolers.

BY 14 *E.* 3. 10. *If any Keeper of a Prison, or Under-keeper, by too great Dures of Imprisonment, and by Pain, make any Prisoner that he hath in his Ward, to become an Appellor against his Will, he is guilty of Felony*: And it is said to be no Way material, whether the Approvement be true or false, or whether the Appellee be acquitted or condemned; but at Law this Offence was esteemed a Misprision only, unless the Appellee were hanged, by reason of the Appeal. 1 H. H. P. C. 640, 641. S. P. C. 36. C. 3 Inst. 91.

CHAP. LII.

Of Offences by Transporters of Sheep or Wool.

Sect. 1. BY some old Statutes, and 13 & 14 *Car.* 2. 18. the Exportation of Wool was made Felony; but by 7 & 8 *W.* 3. 28. it is reduced to a Misdemeanour only, and it is subjected to severe Penalties by many late Statutes. [53] 3 Inst. 95, 96. 1 W. & M. Sess. 1. cap. 32. 7 & 8 W. 3. cap. 28.

Sect. 2. It is enacted by 8 *El.* 3. *That no Person or Persons shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, or received into any Ship or Bottom, any Rams, Sheep or Lambs, or any manner of other Kind of Sheep, being alive, to be carried and conveyed out of this Realm of* England, Wales, *or* Ireland, *or out of any of the King's Dominions, on Pain that every such Person or Persons, their Aiders, Abbettors, Procurers and Comforters, shall for the first Offence forfeit all his Goods for ever, whereof the one Moiety shall be to the King, the other Moiety to him that will sue for the same:* And further, *That every such Offender shall suffer Imprisonment by the Space of one whole Year, without Bail or Mainprize, and at the Year's End, shall in some open Market-Town, in the Fulness of the Market, on the Market-Day, have his left Hand cut off, and that to be nailed up,* 9 & 10 W. 3. cap. 40. 11 & 12 W. 3. cap. 10.

up, in the openeſt Place of ſuch Market; and that every Perſon or Perſons eftſoons offending againſt this Statute, ſhall be adjudged a Felon, &c.

CHAP. LIII.

Of Offences by Servants

IT is recited by 33 *H.* 6. 1. *That divers Houſhold-Servants, as well of Lords, as of other Perſons of good Degree, had then of late, ſhortly after the Death of their ſaid Lords and Maſters, violently, and riotouſly, taken and ſpoiled the Goods which were of their ſaid Lords and Maſters at the Time of their Death, and the ſame diſtributed among themſelves*; and thereupon it is enacted, *That after Information made to the Chancellor by the Executors of any ſuch Perſon, or two of them, of ſuch Riot, Taking, and Spoil; the Chancellor, by the Advice of the two Chief Juſtices, and Chief Baron, or two of them, may make out Writs to ſuch Sheriffs as ſhall be thought neceſſary, commanding them to make ſuch Proclamation, as by the ſaid Statute is directed, for the Offenders to appear in the King's Bench at ſuch a Day, whereupon, if they make Default, they ſhall be attainted of Felony; but if they appear, they ſhall be committed or bailed, till they have anſwered the ſaid Executors in ſuch Actions, which the ſaid Executors will declare againſt them, or any of them, for the Riot, Taking, and Spoiling aforeſaid.*

CHAP. LIV.

Of Offences by Egyptians.

BY 1 & 2 *Ph. & Mar.* 4. *All outlandiſh Perſons, called* Egyptians, *being of the Age of thirteen Years, who ſhall be tranſported into this Realm of* England *or* Wales, *and continue within the ſame by the Space of one Month*; and by 5 *El.* 20. *All Perſons being of the Age of fourteen Years, who ſhall be ſeen or found within this Realm of* England *or* Wales, *in any Company or Fellowſhip of Vagabonds, commonly called, or calling themſelves,* Egyptians, *or counterfeiting, transforming, or diſguiſing themſelves by their Apparel, Speech, or other Behaviour, like unto ſuch Vagabonds, commonly called or calling themſelves* Egyptians, *and ſhall continue and remain in the ſame, either at one Time, or at ſeveral Times, by the Space of one Month, ſhall ſuffer as Felons, without Benefit of Clergy.*

CHAP. LV.

Of Offences by Cutters of Pow-dike.

IT is recited by 22 *H.* 8. 11. which was repealed by 1 *Ed.* 6. and revived by 2 & 3 *Ph. & Mar.* 19. *That divers Perſons had maliciouſly at ſundry times cut down and broken up, divers Parts of the Dike called the new* Pow-dike *in* Marſhland, *in the County of* Norfolk, *and the broken Dike, otherwiſe called* Oldfelde-Dike *by* Marſhland, *in the Iſle of* Ely, *in the County of* Cambridge: *By Reaſon whereof the Ground within the Country of* Marſhland *in the Counties aforeſaid, had been many Times drowned; and the Inhabitants had not only been put to great Charges and Expences, but alſo had loſt much Cattle, and alſo many People had been drowned in their Beds:* And thereupon it is enacted, *That every ſuch perverſe and malicious cutting down, and breaking of, any Part or Parts of the ſaid Dikes, or of any other Bank, being Parcel of the Rind and uttermoſt Part of the ſaid Country of* Marſhland, *by any Perſon or Perſons, otherwiſe than in working upon the ſaid Bank or Dikes, or the repairing, fortifying, and amending of the ſame, ſhall be adjudged Felony, and that the Juſtices of Peace of the ſaid Counties of* Norfolk *and* Cambridge, *within the ſaid Iſle, ſhall have full Power at their Seſſions to uſe Enquiry to be made of every ſuch Offence, to award like Proceſs, Judgment, and Execution, as they have uſed to do upon other Felonies, being Felony at Common Law.*

CHAP. LVI.

Of Offences by Treſpaſſers on the Borders, and Rioters.

IT is recited by 43 *El.* 13. *That then of late Years many of the Queen's Subjects dwelling in the Counties of* Cumberland, Weſtmorland, *and the Biſhoprick of* Durham, *had been taken, ſome from their own Houſes, and other as travelling on the Highway, or otherwiſe, and been carried away as Priſoners, and kept barbarouſly, and cruelly until they had been redeemed by great Ranſoms; and alſo, that then of late Time there had been many Incurſions, Robberies and burning and ſpoiling of Towns, Villages, and Houſes, within the ſaid Counties, ſo that divers of the Queen's Subjects, in the ſaid Counties, had been enforced to pay a certain Rate of Money, Corn, Cattle, or other Conſideration, commonly called Black-mail, to divers inhabiting upon or near the Borders, being Men of Name, and friended and allied with divers in thoſe Parts, who were commonly known to be great Robbers, and Spoil-Takers, within the ſaid Counties, to the End thereby to be by them protected from the Danger of ſuch as uſed to rob and ſteal in thoſe Parts;* and thereupon it is enacted, *That whoſoever ſhall at any Time hereafter without good and lawful Warrant or Authority, take any of her Majeſty's Subjects againſt his or their Will or Wills, and carry them out of the ſame Counties, or detain, force, or impriſon him or them, as Priſoners, or againſt his or their Wills, to ranſom them, or to make Prey or*

Spoil of his or their Perſon, or Goods, upon deadly Feud or otherwiſe: Or whoſoever ſhall be privy, conſenting, aiding, or aſſiſting unto any ſuch Taking, Detaining, or Carrying away, or procure the Taking, Detaining or Carrying away, of any ſuch Perſon or Perſons, Priſoners as aforeſaid: Or whoſoever ſhall take, receive, or carry, to the Uſe of himſelf, or wittingly to the Uſe of any other, any Money, Corn, Cattle, or other Conſideration, commonly called Black-mail, for the protecting, or defending of him or them, or his or their Lands, Tenements, Goods, or Chattels, from ſuch Thefts, Spoils, and Robberies, as is aforeſaid: Or whoſoever ſhall give any ſuch Money, Corn, Cattle, or other Conſideration, called Black-mail, for ſuch Protection as is aforeſaid, and ſhall be of the ſaid ſeveral Offences, or of any of them, indicted and lawfully convicted, or ſhall ſtand mute, or ſhall challenge peremptorily above the Number of twenty before the Juſtices of Aſſizes, Juſtices of Gaol-Delivery, Juſtices of Oyer and Terminer, or Juſtices of Peace, within any of the ſaid Counties, at ſome of their General Seſſions within ſome of the ſaid Counties to be holden, ſhall be reputed, adjudged, and taken to be as Felons, and ſhall ſuffer Pains of Death, without any Benefit of Clergy, &c.

Infrà Ch. 65. Sect. 56, &c.

Notorious Rioters in ſome Caſes, are made guilty of Felony by 1 *Geo.* 1. *c.* 5. as is ſhewn at large in the Chapter of Riots.

For the Suppreſſion of Thieves and Robbers called Moſs-Troopers, ſee 13 and 14 *Ca.* 2. 22. which is continued by 12 *Annæ*, *Stat.* 1. *c.* 10. for ſeven Years, and from thence to the End of the firſt Seſſions of the next Parliament. [54]

CHAP. LVII.

Of Offences by Bankrupts.

Sect. 1. IT is enacted by 4 *Annæ*, 17. which was continued by 7 *Annæ* for ſeven Years, and from thence to the End of the next Seſſion, *That if any Perſon or Perſons who after the 24th of* June 1706. *ſhall become Bankrupt, and againſt whom a Commiſſion of Bankrupt ſhall be awarded, ſhall not within thirty Days next after Notice thereof in Writing, left at the uſual Place of Abode of ſuch Perſon or Perſons, and Notice given in the Gazette that ſuch Commiſſion is iſſued, and of the Time and Place of Meeting of the Commiſſioners, ſurrender him, her, or themſelves to the ſaid Commiſſioners or ſome of them, and ſubmit to be examined, from Time to Time, upon Oath, by and before the ſaid Commiſſioners, or the major Part of them, and in all Things conform to the ſeveral Statutes which had then been made concerning Bankrupts, and alſo upon ſuch Examination fully and truly diſcloſe and diſcover, how, and in what manner, and to whom, and upon what Conſideration, he, ſhe, or they hath or have diſpoſed, aſſigned or transferred, any of his, her, or their Goods, Wares, Merchandizes, Money, or other Effects, or Eſtate, and all Books, Papers and Writings, relating thereunto, of which he, ſhe, or they were poſſeſſed, or in or to which he, ſhe, or they were any Way intereſted, or intitled, or which any Perſon or Perſons, had, hath, or have had, in Truſt for him, her or them, or for his, her, or their Uſe, at any Time before or after the iſſuing out of the ſaid Commiſſion, and alſo deliver up unto the ſaid Commiſſioners, or the major Part of the Commiſſioners by the ſaid Commiſſion authorized, all ſuch Part of his, her, or their, the ſaid Bankrupts Goods, Wares, Merchandizes, Effects and Eſtate, and all Books, Papers and Writings relating thereunto, as at the Time of ſuch Examination ſhall be in his, her, or their Poſſeſſion, Cuſtody or*

Power, (his, her, or their Wives and Childrens neceſſary wearing Apparel only excepted,) then he, ſhe, or they, the ſaid Bankrupt, in Caſe of any Default or wilful Omiſſion therein, or in any the Premiſſes, and being thereof lawfully convicted by Indictment or Information, ſhall ſuffer as a Felon, without the Benefit of Clergy.

Sect. 2. But it is provided by the ſaid Statute, *That the Lord Chancellor may enlarge the Time for ſuch Perſons ſurrendering themſelves, and diſcovering their Eſtates, for any Time as he ſhall think fit, not exceeding ſixty Days, ſo as ſuch Order for ſo enlarging the Time, be made five Days before the Time on which ſuch Perſons were ſo to ſurrender themſelves,* &c.

Sect. 3. And it is farther enacted by 5 *Annæ*, 22. *That if any Perſon or Perſons who ſhall become Bankrupt, or any other Perſon or Perſons, by or with his, her, or their Order, Conſent, or Privity, ſhall after the 25th of April 1707. remove, carry away, conceal, deſtroy, or imbezil any of the Goods, Wares, Merchandizes, Moneys, or Effects, whereof he, ſhe, or they, or any Perſon or Perſons in Truſt for him, her, or them, is, or are poſſeſſed, or intitled unto, to the Value of twenty Pounds or upwards, or any Books of Accompts, Bonds, Bills, Notes, Papers or Writings relating thereunto, with Intent to defraud his, her, or their Creditors, every ſuch Perſon ſo becoming Bankrupt, and being thereof lawfully convicted ſhall ſuffer as a Felon without Benefit of Clergy.* [55]

CHAP. LVIII.

Of Offences by Counterfeiters of Bank-Notes, Exchequer-Bills, Stamps, South-Sea Bonds, Lottery-Orders, &c.

Sect. 1. AND firſt as to Counterfeiters of Bank-Notes it is enacted by 8 & 9 *Will.* 3. 19. Par. 36. *That the forging or counterfeiting the Common Seal of the Governor and Company of the Bank of* England, *or of any ſealed Bank-Bill, made or given out in the Name of the ſaid Governor and Company, for the Payment of any Sum of Money, or of any Bank-Note of any Sort whatſoever, ſigned for the ſaid Governor and Company of the Bank of* England, *or the altering or raſing any Endorſement on any Bank-Bill, or Note of any Sort, ſhall be adjudged to be Felony without Benefit of Clergy.* 11 Geo. 1. Ch. 9. Par. 6.

Sect. 2. Secondly, As to Counterfeiters of Exchequer-Bills, it is enacted, by 7 and 8 *Will.* 3. 31. Par. 78. *That if any Perſon or Perſons ſhall forge or counterfeit any ſuch Bill of Credit, as by the ſaid Statute the Commiſſioners of the Treaſury were authorized to iſſue out, or tender in Payment any forged or counterfeited Bill of Credit, or demand Money thereupon at the Exchequer, (knowing the Bill ſo tendered, or whereupon the Money ſhall be ſo demanded, to be actually forged or counterfeited) and with Intention to defraud his Majeſty, or any other Perſon or Perſons, every ſuch Perſon or Perſons ſo offending ſhall be adjudged a Felon.*

Sect. 3. And the like was enacted by 8 & 9 *Will.* 3. 23. in relation to the Exchequer-Bills iſſued out by Authority of that Statute, and the Offenders are excluded from the Benefit of the Clergy, as appears from *Waſhington*; but this Part of the Statute is omitted out of the laſt Volume of the Statutes at large. Waſhington's Abr. 513.

Sect. 4. And it is farther enacted by 5 *Annæ*, 13. Par. 22. *That if any Perſon or Perſons ſhall forge or counterfeit any Exchequer-Bill to be iſſued by Virtue*

Virtue of that Statute, or any Endorſement thereon, or tender in Payment any ſuch forged or counterfeit Exchequer-Bill, or with ſuch counterfeit Endorſement, or demand to have the ſame exchanged for ready Money by the Governor and Company of the Bank of England *or their Succeſſors, (knowing the Bill ſo tendered or demanded to be exchanged, or the Endorſement thereon to be forged or counterfeit) and with Intention to defraud her Majeſty, her Heirs or Succeſſors, or the ſaid Governor and Company, or their Succeſſors, or any Perſon or Perſons, Body Politick or Corporate, then every ſuch Perſon or Perſons ſo offending, (being thereof lawfully convicted) ſhall be adjudged a Felon, and ſuffer as in Caſes of Felony, without Benefit of Clergy.*

Sect. 5. And the like is enacted by 7 *Annæ*, 7. and alſo by 9 *Annæ*, 7. and by 1 *Georg.* 1. *c.* 12. in relation to Exchequer-Bills made forth in Purſuance of thoſe Acts.

Sect. 6. As to Counterfeiters of Stamps, it is enacted by 9 and 10 *Will.* 3. 25. Par. 59. *That if any Perſon or Perſons whatſoever ſhall counterfeit or forge any Stamp or Mark to reſemble any Stamp or Mark which ſhall be provided, made or uſed in purſuance of that Act, or ſhall counterfeit or reſemble the Impreſſion of the ſame, upon any Vellum, Parchment or Paper, thereby to defraud his Majeſty, his Heirs or Succeſſors, of any of the ſaid Duties upon Vellum, Parchment or Paper, or ſhall utter, vend, or ſell Vellum, Parchment or Paper, with ſuch counterfeit Mark or Marks thereupon, knowing ſuch Mark or Marks to be counterfeit, that the Perſon ſo offending being thereof convicted in due Form of Law, ſhall be judged a Felon, and ſhall ſuffer Death, as in Caſes of Felony, without the Benefit of Clergy.*

Sect. 7. And the like is enacted by 10 *Annæ*, 19. in relation to the Stamps to be provided in Purſuance of that Act, with this Addition, *That thoſe who ſhall privately and fraudulently uſe any Stamps or Marks thereby to defraud her Majeſty of any Duty upon Vellum, Parchment or Paper by the ſaid Act granted, ſhall be adjudged in like manner guilty.*

And the like is enacted 10 *Annæ*, 26. and by 12 *Annæ*, 9. and alſo by 12 *Annæ*, 19. In relation to the Stamps or Marks to be provided in Purſuance of thoſe Statutes.

Sect. 8. As to Counterfeiters of South-Sea Bonds, it is enacted by 9 *Annæ*, 21. *That if any Perſon or Perſons ſhall forge or counterfeit the common Seal of the South-Sea Company, or ſhall forge, counterfeit or alter any Bond or Obligation under the common Seal of the ſaid Company, or ſhall offer to diſpoſe of, or pay away any ſuch forged, counterfeited, or altered Bond, (knowing the ſame to be ſuch) or ſhall demand the Money therein contained, or pretended to be due thereon; or any Part thereof, of the ſaid Company, or any of their Officers, knowing the ſame to be forged, counterfeited, or altered, with Intent to defraud the ſaid Company, or any other Perſon or Perſons, every ſuch Offender ſhall ſuffer as a Felon without the Benefit of Clergy.*

Sect. 9. As to Counterfeiters of Lottery-Orders, it is enacted by 12 *Annæ*, 2. *That if any Perſon or Perſons ſhall forge or counterfeit any Lottery-Order, made in Purſuance of* 9 Annæ, 6 *or* 23. *or* 10 Annæ, 19 *or* 26. *or alter the Number or principal Sum of any ſuch Order, or counterfeit the Hand of any Perſon to ſuch Order, thereby to procure a fraudulent Aſſignment, or ſell any ſuch Order, knowing the ſame to be forged or counterfeit, or knowing that the Name of the Owner is forged, in order to procure ſuch fraudulent Aſſignment; then all and every ſuch Perſon or Perſons being therefore convict, ſhall ſuffer as in Caſes of Felony, without Benefit of Clergy.*

For other Forgeries relating to Publick Securities, ſee the Additions from Number [55] to [61] And for other Felonies by later Statutes, ſee the Additions from [60] to [81] See alſo the Chapters of *Perjury* and *Forgery*, infra,

CHAP. LIX.

Of Miſpriſion of Felony.

OFFENCES more immediately againſt the Subject, not capital, are either Miſpriſion of Felony, or other inferior Offences. 1 H. H. P. C. 652, 708. Bro. Treaſ. 25. 2 Ric. 3. 10. S. P. C. 32. d.

Sect. 1. It is ſaid, That every Felony includes Miſpriſion of Felony, d may be proceeded againſt as a Miſpriſion only if the King pleaſe, as th been ſhewn already in Chapter 20.

Sect. 2. But generally Miſpriſion of Felony is taken for a Concealment Felony, or a procuring of the Concealment thereof, whether it be Felo- by the Common Law, or by Statute. [81] H. P. C. 129. S. P. C. 37. c. 3 Inſt. 139.

Sect. 3. For this Offence every common Perſon is puniſhable by Fine d Impriſonment at Common Law. And by the Statute of *Weſtm.* 1. 9. Bro. Treaſ. 25.

the Sheriff, Coroner, or any other Bailiff within a Franchiſe or without, 3 Inſt. 173. *Reward or for Prayer, or for Fear, or for any manner of Affinity, aceal, conſent, or procure to conceal the Felonies done in their Liberties; or herwiſe will not attach nor arreſt ſuch Felons (there as they may) or otherwiſe ll not do their Office, for Favour borne to ſuch Miſ-doers, and be attainted reof, they ſhall have one Year's Impriſonment, and after make a grievous ne at the King's Pleaſure, if they have wherewith; and if they have not hereof, they ſhall have Impriſonment of three Years.*

Sect. 4. By 3 *H.* 7. 1. *The Juſtices of the Peace of every Shire of this alm, for the Time being, may take by their Diſcretion an Inqueſt, where- every Man ſhall have Lands and Tenements to the yearly Value of forty illings at the leaſt, to enquire of the Concealments of other Inqueſts taken fore them, and afore other, of ſuch Matters and Offences as are to be en- ired and preſented afore Juſtices of Peace, whereof Complaint ſhall be made Bill or by Bills, as well within Franchiſe as without. And if any ſuch Con- alment be found of any Inqueſt, as is afore rehearſed, had or made within Year after the ſame Concealment, every Perſon of the ſame Inqueſt to be nerced for the Concealment, by Diſcretion of the ſame Juſtices of the Peace, ſaid Amerciaments to be ſeſſed in plain Seſſions.*

Sect. 5. To this Title of Miſpriſion of Felony, That of Theftbote ems not improperly reducible, which is where one not only knows a Felony, but takes his Goods again, or other amends, not to pro- cute. 1 H. H. P. C. 619. S. P. C. 40. b. Ch. 43. 3 Inſt. 134. H. P. C. 130.

Sect. 6. This Offence is very nearly allied to Felony, and is ſaid to have en anciently puniſhed as ſuch: But at this Day it is puniſhable only with anſom and Impriſonment, unleſs it were accompanied with ſome Degree Maintenance given to the Felon, which makes the Party an Acceſſary ter the Fact. S. P. C. 40. b. Fitz. Coro. 353. 2 H. H. P. C. 400. 3 Inſt. 134.

2 And 47, 48. Cro. Eliz. 536. B. 2. Ch. 29. Sect. 26, &c.

Sect. 7. But the bare Taking of one's own Goods again, which have en ſtoln, is no Offence at all, unleſs ſome Favour be ſhewn to the Thief. Bro. Cor. 122. 42 Aſſ. Pl. 5.

H. P. C. 130. Cro. El. 486. Pl. 3. 1 Rol. Ab. 67. Pl. 27. Fitz. Aſſiſe 346.

CHAP. LX.

Of Surety of the Peace.

INferior Offences more immediately againſt the Subject, not capital, either amount to an actual Diſturbance of the Peace, or do not.

And firſt I ſhall conſider ſuch Offences of this Kind, as amount to an actual Diſturbance of the Peace: But before I deſcend to the ſeveral Kinds thereof, it may not be improper firſt to ſhew what Security may be had againſt the Breach of the Peace before it happens; and in order hereto, I ſhall examine how the Breach may be ſecured.

1. By Surety for keeping the Peace.
2. By Surety for the good Behaviour.

As to Surety for keeping the Peace, I ſhall conſider the following Particulars:

1. In what Caſes it ought to be taken *ex Officio*.
2. At whoſe Requeſt it ought to be granted.
3. Againſt whom it ought to be granted.
4. For what Cauſe it is grantable.
5. In what manner it is grantable by the Courts of Chancery and King's Bench.
6. In what manner it is grantable by a Juſtice of Peace.
7. In what manner the Proceſs for it ought to be executed.
8. How ſuch Proceſs may be ſuperſeded.
9. What ought to be the Form of a Recognizance for this Purpoſe.
10. How ſuch a Recognizance may be diſcharged.
11. How ſuch a Recognizance ought to be certified and proceeded upon.
12. How it may be forfeited.

Dalt. cap. 67. fol. 158, 159. Lamb. 77, 78. 9 Ed. 4. 3. a. Bro. Peace 7, 8. Crom. 135, 142.

Sect. 1. As to the firſt Point, *viz.* In what Caſes Surety of the Peace ought to be taken *ex Officio*, it ſeems, That any Juſtice of Peace may, according to his Diſcretion, bind all thoſe to the Peace, who in his Preſence ſhall make any Affray, or ſhall threaten to kill or beat any Perſon, or ſhall contend together with hot Words, or ſhall go about with unuſual Weapons or Attendants, to the Terror of the People; and alſo all ſuch Perſons as ſhall be known by him to be common Barrators; and alſo all thoſe who ſhall be brought before him by a Conſtable for a Breach of the Peace in the Preſence of ſuch Conſtable; and all ſuch Perſons who, having been before bound to keep the Peace, ſhall be convicted of having forfeited their Recognizance.

Dalt. cap. 67. 21 E. 4. 40. Crom. 142. b. Dalt. cap. 67.

Dalt. cap. 68. Lamb. 78, 79. Crom. 133. b. 134.

Sect. 2. As to the ſecond Point, *viz.* At whoſe Requeſt the Surety of the Peace ought to be granted; it ſeems agreed at this Day, That all Perſons whatſoever, under the King's Protection, being of ſane Memory, whether they be natural and good Subjects, or Aliens, or attainted of Treaſon, *&c.* have a Right to demand Surety of the Peace.

Dalt. cap. 68. Lamb. 80.

Sect. 3. But it has been queſtioned, whether Jews or Pagans, or Perſons attainted of *Præmunire*, have a Right to it or not.

Sect. 4. However it is certain, That a Wife may demand it againſt her Husband threatening to beat her outrageouſly, and that a Husband alſo may have it againſt his Wife. Dalt. cap. 68. Lamb. 78. Crom. 133. b. 3 Lev. 128. F. N. B. 80. f.

Sect. 5. As to the third Point, *viz.* Againſt whom the Surety of the Peace ought to be granted, there ſeems to be no Doubt but that it ought upon a Juſt Cauſe of Complaint to be granted by any Juſtice of Peace, againſt any Perſon whatſoever, under the Degree of Nobility, being of ſane Memory, whether he be a Magiſtrate or private Perſon, and whether he be of full Age or under Age, *&c.* But Infants and Femes Covert ought to find Surety by their Friends, and not to be bound themſelves; and the ſafeſt Way of proceeding againſt a Peer is by Complaint to the Court of Chancery or King's Bench. Dalt. cap. 68. Lamb. 81, 82. Cromp. 134, 135. See the Books above cited, and Fitz. Subpœna 20.

Sect. 6. As to the fourth Point, *viz.* For what Cauſe the Surety of the Peace is grantable; it ſeems clear, That where-ever a Perſon has juſt Cauſe to fear that another will burn his Houſe, or do him a corporal Hurt, as by killing or beating him, or that he will procure others to do him ſuch Miſchief, he may demand the Surety of the Peace againſt ſuch Perſon; and that every Juſtice of Peace is bound to grant it, upon the Party's giving him Satisfaction upon Oath, that he is actually under ſuch Fear; and that he has juſt Cauſe to be ſo, by Reaſon of the other's having threatened to beat him, or lain in wait for that Purpoſe; and that he does not require it out of Malice, or for Vexation. Dalt. cap. 67. Lamb. 82. Crom. 135.

Sect. 7. It ſeems alſo the better Opinion, That he who is threatened to be impriſoned by another, has a Right to demand the Surety of the Peace; for every unlawful Impriſonment is an Aſſault and Wrong to the Perſon of a Man: And the Objection, That one wrongfully impriſoned may recover Damages in an Action, *&c.* and therefore needs not the Surety of the Peace, is as ſtrong in the Caſe of Battery as Impriſonment, and yet there is no doubt, but that one threatened to be beaten may demand the Surety of the Peace. Dalt. cap. 67. Lamb. 82, 83. Con. 17 Ed. 4. 4. Bro. Peace 22. Crom. 135. a.

Sect. 8. As to the fifth Point, *viz.* In what manner ſuch Surety is grantable by the Courts of Chancery and King's Bench, it is enacted by 21 Jac. 1. 8. *That all Proceſs for the Peace or good Behaviour to be granted or awarded out of the ſame Courts, or either of them, againſt any Perſon or Perſons whatſoever, at the Suit of, or by the Proſecution of any Perſon or Perſons whatſoever, ſhall be void and of none Effect, unleſs ſuch Proceſs ſhall be ſo granted or awarded, upon Motion firſt made before the Judge or Judges of the ſame Courts reſpectively, (ſitting in open Court, and upon Declaration in Writing upon their corporal Oaths, to be then exhibited unto them by the Parties which ſhall deſire ſuch Proceſs) of the Cauſes for which ſuch Proceſs ſhall be granted or awarded, by or out of the ſaid Courts reſpectively, and unleſs that ſuch Motion and Declaration be mentioned to be made upon the back of a Writ, the ſaid Writings there to be entered and remain of Record: And that if it ſhall afterwards appear unto the ſaid Courts, or either of them reſpectively, that the Cauſes expreſs'd in ſuch Writings, or any of them be untrue, That then the Judge or Judges of the ſaid Courts, or either of them reſpectively, ſhall and may award ſuch Coſts and Damages unto the Parties grieved, for their, or any of their wrongful Vexations in that Behalf, as they ſhall think fit: And that the Party or Parties ſo offending, ſhall and may be committed to Priſon by ſuch Judge or Judges, until he or they pay the ſaid Coſts and Damages.* See 1 Lev. 53. 1 Syd. 67.

Sect. 9. As to the ſixth Point, *viz.* In what manner ſuch Surety is grantable by a Juſtice of Peace, it ſeemeth certain, That if the Perſon to be bound be in the Preſence of the Juſtice, he may be immediately com- 14 H. 7. 8, 9, 10. 9 Ed. 4. 3. a. Bro. Mainpr. 39.

committed, unleſs he offer Sureties; and from hence it follows, *a fortiori*, That he may be commanded by Word of Mouth to find Sureties, and committed for his Diſobedience; but it is ſaid, That if he be abſent, he cannot be committed without a Warrant from ſome Juſtice of Peace, in order to find Sureties, and that ſuch Warrant ought to be under Seal, and to ſhew the Cauſe for which it is granted, and at whoſe Suit, and that it may be directed to any indifferent Perſon.

Lamb. 85, &c. Dalt. ca. 69.

Sect. 10. As to the ſeventh Point, *viz.* In what Manner the Proceſs for the Peace ought to be executed, it ſeems needleſs to give a particular Account of the Execution of the Writ of *Supplicavit*, becauſe I do not find that it is much in Uſe at this Day, and therefore I ſhall refer the Reader for this purpoſe to *Fitzherbert's Natura Brevium*, fol. 80, *&c.* But as to the Execution of a Warrant of a Juſtice, the following Rules are to be obſerved.

Lamb. 89.

Sect. 11. I. It can be executed only by the Perſons to whom it is directed, or ſome of them, unleſs it be directed to the Sheriff, who may either by Parol, or by Precept in writing, authorize an Officer ſworn and known, to ſerve it, but cannot impower any other Perſon without a Precept in writing.

Sect. 12. II. If the Warrant be made in the common Form, directing the Officer to cauſe the Party complained of to come before ſome Juſtice of Peace, to find ſufficient Surety, *&c.* and if he ſhall refuſe ſo to do, to convey him immediately to Priſon, without expecting any further Warrant, until he ſhall willingly do the ſame, *&c.* the Officer who ſerves it, before he makes any Arreſt, ought firſt to require the Party to go with him, and find Sureties according to the Purport of the Warrant, but upon his Refuſal to do either, he may carry him to the Gaol by Force of the ſame Warrant, without more.

Long Quinto, 5 Ed. 4. 12. b. 13. a. Bro. Falſe Impriſ. 18. Dalt. ca. 69. Lamb. 90, 91. Crom. 235. 5 Co. 59. b.

Sect. 13. III. If the Warrant ſpecially direct, that the Party ſhall be brought before the Juſtice who made it, the Officer ought not to carry him before any other: But if the Warrant be general, to bring him before any Juſtice of Peace, *&c.* the Officer has the Election to bring him before what Juſtice he pleaſes, and may carry him to Priſon for refuſing to find Surety before ſuch Juſtice.

5 Co. 59. Dal. ca. 69. Bro. Falſe Impriſon. 11. 21 H. 7. 21. a. Lamb. 94, 95.

Sect. 14. As to the eighth Point, *viz.* How ſuch Proceſs may be ſuperſeded, it is ſaid, That if one who fears that the Surety of the Peace will be demanded againſt him, find Sureties before any Juſtice of the Peace of the ſame County, either before or after a Warrant is iſſued againſt him, he may have a *Superſedeas* from ſuch Juſtice, which ſhall diſcharge him from Arreſt from any other Juſtice, at the Suit of the ſame Party, for whoſe Security he has given ſuch Surety: Alſo it is ſaid, That an Appearance upon a Recognizance for the Peace may be ſuperſeded, by finding Sureties in the Chancery or King's Bench, and purchaſing a Writ teſtifying the ſame. But this Practice having often been abuſed by turbulent Perſons, who deſervedly fearing to be bound to the Peace or Good Behaviour, by Juſtices of Peace, would procure themſelves to be bound thereto in the ſaid Courts, upon inſufficient Sureties, or upon the colourable Proſecution of ſome Perſon who would be ready at all Times to releaſe them at their Pleaſure; whereupon Writs of *Superſedeas* had been often directed to Juſtices of Peace, commanding them to forbear to arreſt the Parties for ſuch Cauſes; by reaſon whereof ſuch turbulent Perſons uſed to miſdemean themſelves among their Neighbours with Impunity, as it is recited by 21 *Jac.* 1. 8. it is thereupon enacted by the ſaid Statute, *That all Writs of* Superſedeas, *to be granted out of either of the ſaid Courts,*

Dalt. c. 69.

Lamb. 112, 113. See 2 Roll. A. 492. F.

all be void, unleſs ſuch Proceſs be granted upon Motion in open Court firſt made, &c. upon ſuch ſufficient Sureties, as ſhall appear unto the Judge or Judges of the ſame Court reſpectively, upon Oath, to be aſſeſſed at five Pounds Lands, or ten Pounds in Goods, in the Subſidy Book, at the leaſt; which Oaths, and the Names of ſuch Sureties, with the Places of their Abode, and where they ſtand ſo aſſeſſed in the Subſidy Books, ſhall be entred, and remain of Record in the ſame Courts: And unleſs it ſhall alſo firſt appear unto the ſaid Judge or Judges, from whom ſuch Superſedeas *is deſired, That the Proceſs of the Peace, or good Behaviour, is proſecuted againſt him or them, deſiring ſuch* Superſedeas, bona fide, *by ſome Party grieved, in that Court, out of which ſuch* Superſedeas *is deſired to be ſo awarded and directed.* 2 Chancery Reports, 68.

Sect. 15. As to the ninth Point, *viz.* What ought to be the Form of ſuch a Recognizance: If it be taken in Purſuance of a Writ of *Supplicavit*, it muſt be wholly governed by the Directions of ſuch Writ; but if it be taken before a Juſtice of Peace, upon a Complaint below, it ſeems that it may be regulated by the Diſcretion of ſuch Juſtice, both as to the Number and Sufficiency of the Sureties, and the Largeneſs of the Sum, and the Continuance of the Time, for which the Party ſhall be bound; and it hath been ſaid, That a Recognizance to keep the Peace ſhall be to *A. B.* for a Year, or for Life, or without expreſſing any certain Time, (in which Caſe it ſhall be intended to be for Life) or without fixing any Time or Place for the Party's Appearance, or without binding him to keep the Peace againſt all the King's People in general, is good. Lamb. 100, 101. Dal. ca. 70.

Sect. 16. However, it ſeems to be the ſafeſt Way to bind the Party to appear at the next Seſſions of the Peace, and in the mean Time to keep the Peace as to the King, and all his Liege People, eſpecially as to the Party, according to the common Form of Precedents. Lamb. 105. Dal. ca. 124.

Sect. 17. As to the tenth Point, *viz.* How ſuch a Recognizance may be diſcharged, it ſeems agreed, That it may be diſcharged by the Demiſe of the [a] King in whoſe Reign it was taken, or of the [b] principal Party who was bound thereby, if it were not forfeited before; alſo it hath been holden, That it may be diſcharged by the Releaſe of the Party at whoſe Complaint it was taken, being certified together with it, but this may juſtly be queſtioned, becauſe the Recognizance is not to the Subject, but to the King, and conſequently cannot be diſcharged by the Subject, who is not a Party to it; however, ſuch a Releaſe will be a good Inducement to the Court, to which ſuch a Recognizance ſhall be certified, to diſcharge it; and ſo alſo will the Non-Appearance of the Party at whoſe complaint it was taken, in order to pray the Continuance of it; and yet it is ſaid, That the Seſſions in that Caſe may, in their Diſcretion, refuſe to diſcharge it; however, it is certain that ſuch a Recognizance cannot be pardoned, or releaſed by the King, before it is broken, becauſe the Subject has a Kind of Intereſt in it; and it is ſaid, That [d] the Sureties are not diſcharged by their Death, but that their Executors, *&c.* continue bound as their Teſtators, *&c.* were.

[a] Bro. Peace 15. 1 H. 7. 2. [b] 15 H. 7. 2. b. 13. A. 21 Ed. 4. 70. b. Dalt. ch. 71. 1 Lev. 235. [c] Lamb. 110, &c. Crom. 139. b. 169. a. Bro. Peace 17. Crom. 144. b. 1 H. 7. 10. b. 11 H. 7. 12. a. 11 H. 4. 43. a. B. 2. Ch. 26. S. 64. Ch. 37. S. 34. [d] Bro. Peace 17.

Sect. 18. As to the eleventh Point, *viz.* How ſuch a Recognizance ought to be certified, and proceeded upon: If it be taken by Force of a Writ of *Supplicavit*, it needs not be certified till the Juſtice receive a Writ of *Certiorari* to that Purpoſe; but if it be taken upon a Complaint below, it muſt be certified, ſent, or brought to the next Seſſions of the Peace by Force of 3 *H.* 7. 1. that the Party ſo bound may be called; and by the ſame Statute, *If the Party then make Default, the ſame Default ſhall be then recorded, and the ſame Recognizance with the Record of the Default, ſhall* Lamb. 111. 112, &c. Dalt. ca. 70.

Hill. 1 Geo. 1. between the King and Combs agreed.

be certified into the Chancery, King's Bench or Exchequer: However, if the Party have any Excuſe for his not appearing, it ſeems that the Seſſions is not bound peremptorily to record his Default, but may equitably conſider of the Reaſonableneſs of ſuch Excuſe; and it is ſaid, That the Seſſions cannot in any Caſe proceed againſt the Party for a Forfeiture of his Recognizance, either in reſpect of his not appearing, or breaking the Peace, but that the Recognizance in ſuch Caſe ought to be removed into ſome of the King's Courts of *Weſtminſter Hall*, who ſhall proceed by *Scire Facias* upon ſuch Recognizance, and not by Indictment, *&c.*

Dal. ch. 71. Raym. 169. Cro. Ja. 598. 1 Roll. A. 900. Pl. 4.

Sect. 19. It ſeemeth, that in a *Scire Facias* upon ſuch a Recognizance, it is ſufficient to lay the Fact alledged for a Breach thereof, as having been done *contra pacem*, without uſing the Words *Vi & Armis*.

3 Bulſt. 120. Whether ſuch Scire Facias muſt ſhew the Day on which the Seſſions was holden, till which the Party was bound to keep the Peace. Cro. Ca. 138.

Bro. Peace 20. Dalt. ch. 72. Lamb. 127, 128.

Sect. 20. As to the twelfth Point, *viz.* How ſuch Recognizance may be forfeited, there is no Doubt but that it may be forfeited by any actual Violence to the Perſon of another, whether it be done by the Party himſelf, or by others thro' his Procurement, as Manſlaughter, Rape, Robbery, unlawful Impriſonment, *&c.*

Lamb. 115, &c. Dalt. ch. 72. 2 H. 7. 2. b. ſeems otherwiſe. 18 Ed. 4. 28. a. 22 Ed. 4. 35. b. 7, 8. 547. E. 3.

Sect. 21. Alſo it has been holden, That it may be forfeited by any Treaſon againſt the Perſon of the King, and alſo by any unlawful Aſſembly *in Terrorem populi*, and even by Words directly tending to a Breach of the Peace, as by challenging one to fight, or, in his Preſence, threatning to beat him, *&c.*

Cro. Ca. 498, 499. See the Books cited in the following Section, and 2 R. A. 545. Pl. 2, 3, 4, 5, 6.

Cro. El. 86. Mo. 249. 2 Rol. Re. 199, 227. Palm. 126. Infra Ch. 61. S. 3.

Sect. 22. However, it ſeems that it ſhall not be forfeited by bare Words of Heat and Choler, as the calling a Man Knave, Teller of Lies, Raſcal, or Drunkard; for though ſuch Words may provoke a cholerick Man to break the Peace, yet they do not directly challenge him to it, nor does it appear that the Speaker deſigned to carry his Reſentment any farther: And it hath been ſaid, That even a Recognizance for the good Behaviour, ſhall not be forfeited for ſuch Words; from whence it follows, *à fortiori*, That a Recognizance for the Peace ſhall not.

[a] 2 Ed. 4. 6. 21 H. 7. 39. [b] Dalt. ca. 72. Crom. 136. b. [c] 38 H. 6. 25. 1 Sid. 176, 177. [d] H. P. C. 31. 1 Sid. 177. 21 Ed. 4. 6. [e] Dal. ca. 72. [f] Crom. 28. b. 136. b. F. N. B. 80. F. Hetley 149. Contra 1 Syd. 113, 116. [g] 22 Aſſ. 56. 2 R. A. 546. C. 22 Ed. 4. 5. a. b. [h] Cro. Ja. 134. 2 R. A. 546. Pl. 35, 59. E.

Sect. 23. Alſo there are ſome actual Aſſaults on the Perſon of another, which do not amount to a Forfeiture of ſuch a Recognizance; as if an [a] Officer, having a Warrant againſt one who will not ſuffer himſelf to be arreſted, beat or wound him in the Attempt to take him; or if a [b] Parent in a reaſonable Manner chaſtiſe his Child, or a Maſter his Servant, [c] being actually in his Service at the Time; or a [d] Schoolmaſter his Scholar, or a [e] Gaoler his Priſoner, or even a [f] Husband his Wife, as ſome ſay; or if [g] one confine a Friend who is mad, and bind, and beat him, *&c.* in ſuch a Manner as is proper in ſuch Circumſtances; or if a Man [h] force a Sword from one who offers to kill another therewith; or if a Man gently lay his Hands upon another, and thereby ſtay him from inciting a Dog againſt a third Perſon; or if [i] I beat one (without [k] wounding him, or throwing at him a dangerous Weapon) who wrongfully endeavours with Violence to diſpoſſeſs me of my Land, or Goods; or the Goods of another delivered to me to be kept for him, and will not deſiſt upon my laying my Hands gently on him, and diſturbing him; or if a Man beat, [l] or, as ſome ſay, wound, or maim one who makes an

[i] 3 H. 4. 6. b. 9. a. Lutw. 1483. Cro. Ja. 236. Cro. Ca. 138. 19 H. 6. 31. b. 10 E. 4. 6. b. 11 Ed. 4. 28. b. Kellew. 92. a. Yelv. 172. 2 R. A. 547. E. 1, 2. 548. Pl. 2, 3, 4, 5, 6, 7. 549. Pl. 9, 10, 11. Pult. 5, 6. Crom. 137. a. Dal. ca. 72. Infra Ch. 64. S. 1. [k] 2 R. A. 548. Pl. 4, 8. [l] 41 Aſſ. 21. 27 Ed. 3. 94. 2. 25 Ed. 3. 42. a. 8 H. 4. 8. a. b. 9 Ed. 4. 48. b. 12 Ed. 4. 6. a. Bro. de Tort. Demeſne 57. 1 Sid. 246. Kely. 128. 2 R. A. 547. F. Pl. 1, 2, 3, 4. 1 Keb. 884, 921. 2 Inſt. 316.

ſſault upon his Perſon, or that of his [a] Wife, Parent, Child, or Maſter; ſpecially if it appear that he did all he could to avoid fighting before he ve the Wound; or if a Man [b] fight with or beat one who attempts to kill y Stranger; or if a Man even [c] threaten to kill one who puts him in Fear f Death in ſuch a Place where he cannot ſafely fly from him; or if one [d] npriſon thoſe whom he ſees fighting, till the Heat is over. [a] 35 H. 6. 50. b. 51. a. 19 H. 6. 31. a. b. 66. a. [b] 12 H. 8. 2. b. [c] 32 H. 6. 18. b. 10 Ed. 4. 6. b. 12 Ed. 4. 6. a. Crom. 136. b. [d] 2 Rol. Ab. 559 E. Dal. ca. 72. 2 R. A. 546. D. 1, 2, 3. 22 E. 4. 45. b.

Sect. 24. According to ſome Opinions, a [e] Maſter ſhall not forfeit ſuch Recognizance for beating another in Defence of his Servant, but it is ſaid, hat a [f] Servant is liable to ſuch Forfeiture for beating another in Defence f his Maſter's Son, tho' he were commanded by the Maſter ſo to do, beuſe he is not a Servant to the Son; and for the like Reaſon it is ſaid, That [g] Tenant ſhall incur the like Forfeiture for beating another in Defence of is Landlord, *&c.* [e] 2 R. A. 546. D. 2. 19 H. 6. 31. b. 66. a. Dalt. ca. 72. Crom. 136. b. Con. 9 Ed. 4. 48. b. Salk. 407. 2. [f] 9 Ed. 4. 48. b. Bro. Treſp. 189. [g] Dalt. ch. 72. Lamb. 129.

Sect. 25. But it ſeems agreed, That no one ſhall forfeit ſuch a Recognizance by a bare Treſpaſs on another's Lands, or Goods, unleſs it be accompanied with ſome Violence to the Perſon. Crom. 136. b. Dalt. ca. 72. Cro. El. 86. Moor 249.

Sect. 26. And it ſeems to be the better Opinion, That a Man is in no anger of ſuch a Forfeiture from any Hurt done to another, by playing t Cudgels, or ſuch like Sport, by Conſent, becauſe the Intent of the arties ſeems no way unlawful, but rather commendable, and tending utually to promote Activity and Courage; yet it is ſaid, That he who ounds another in fighting with naked Swords, does in ſtrictneſs forfeit uch a Recognizance, becauſe no Conſent can make ſo dangerous a Diverſion awful. Dalt. ca. 22. Bro. Coron. 229. Fitz. Bar. 244.

Sect. 27. But it ſeemeth, That a Man ſhall not forfeit ſuch Recogniance, by a Hurt done to another merely thro' Negligence, or Miſchance; s where one Soldier hurts another by diſcharging a Gun in Exerciſe, without ufficient Caution; for notwithſtanding ſuch Perſon muſt, in a Civil Action, ive the other Satisfaction for the Damage occaſioned by his Want of Care, et he ſeems not to have offended againſt the Purport of ſuch a Recogniance, unleſs he be guilty of ſome wilfull Breach of the Peace. Ho. 134. 2 R. A. 548. G.

CHAP. LXI.

Of Surety for the Good Behaviour.

AND now we are come to Surety for the Good Behaviour, which being of great Affinity with Surety of the Peace, both as to the Manner in which it is to be taken, ſuperſeded, and diſcharged, *&c.* ſeems not to require a particular Conſideration, ſave only as to the following Points,

1. For what Misbehaviours it is to be required.
2. For what it ſhall be forfeited.

Sect. 1. As to the firſt Point, it is to be obſerved, That by 34 *Ed.* 3. 1. *Juſtices of Peace are impowered to reſtrain Offenders, Rioters, and all other Barrators, and to purſue, arreſt, take, and chaſtiſe them, according to their Treſpaſs, or Offence; and to cauſe them to be impriſoned, and duly puniſhed according to*

to the Laws and Cuſtoms of the Realm, and according to that which to them ſhall ſeem beſt to do by their Diſcretions, and good Adviſement, and alſo to inform them, and to enquire of all thoſe that have been Pillors and Robbers in the Parts beyond the Sea, and be now come again, and go wandring, and will not labour as they were wont in Times paſt; and to take and arreſt all thoſe, that they may find by Indictment or by Suſpicion, and to put them in Priſon, and to take of all them that be not of good Fame, where they ſhall be found, ſufficient Surety and Mainprize of their good Behaviour towards the King and his People, and the other duly to puniſh, to the Intent that the People be not by ſuch Rioters troubled nor endamaged, nor the Peace blemiſhed, nor Merchants, nor others paſſing by the Highways of the Realm diſturbed, nor put in the Peril which may happen of ſuch Offenders.

4 Inſt. 181. 2 H. 7. 2. b. 3. a. Lamb. 115, 116, 117. Dalt. ca. 75.

Sect. 2. In the Conſtruction hereof there ſeem to have been ſome Opinions, that the Statute, ſpeaking of thoſe that be not of good Fame, means only ſuch as are defamed, and juſtly ſuſpected that they intend to break the Peace, and that it does not any Way extend to thoſe who are guilty of other Misbehaviours not relating to the Peace; but this ſeems much too narrow a Conſtruction, ſince the above mentioned Expreſſion of Perſons of evil Fame, in common Underſtanding, as properly includes Perſons of ſcandalous Behaviour in other Reſpects, as thoſe who by their quarrelſome Behaviour give juſt Suſpicion of their Readineſs to break the Peace; and accordingly it ſeems to have been always the better Opinion, That a Man may be bound to his Good Behaviour for many Cauſes of Scandal which give him a bad Fame, as being contrary to good Manners only; as for [a] haunting Bawdy-houſes with Women of bad Fame; or for [b] keeping bad Women in his own Houſe; or for ſpeaking Words of Contempt of an inferiour [c] Magiſtrate, as a Juſtice of Peace, or Mayor of a Town, *&c.* tho' he be not then in the actual Execution of his Office, or of an inferior Officer of Juſtice, as a Conſtable, and ſuch like, being in the actual Execution of his Office.

[a] 13 H. 7. 10. b. [b] Crom. 140. a. [c] Cro. El. 78. 1 Levin. 52, 53, 107. 11 Co. 98. 1 Ro. Re. 224. Latch 220. Con. Cro. El. 689. Palm. 130. 1 Rol. Rep. 227, 228. 3 Bulſt. 139, 140. [d] Cro. Ca. 498, 499. [e] Cro. El. 86. Moor 249. Supra Ch. 60. S. 22. 2 Rol. Re. 199, 227. Palm. 126. Dalt. 75. 1 Rol. Re. 150. 2 Ventr. 22, 23, 24.

Sect. 3. However, it ſeems the better Opinion, That no one ought to be bound [d] to the Good Behaviour for any raſh, quarrelſome, or unmannerly Words, unleſs they either directly tend to a Breach of the Peace, or to ſcandalize the Government, by abuſing thoſe who are intruſted by it with the Adminiſtration of Juſtice, or to deter an Officer from doing his Duty; and therefore it ſeems, That he [e] who barely calls another Rogue, or Rascal, or Teller of Lies, or Drunkard, *&c.* ought not for ſuch Cauſe to be bound to the Good Behaviour.

Sect. 4. However, I cannot find any certain preciſe Rules for the Direction of the Magiſtrate in this Reſpect, and therefore am inclined to think, that he has a diſcretionary Power to take ſuch Surety of all thoſe whom he ſhall have juſt Cauſe to ſuſpect to be dangerous, quarrelſome, or ſcandalous, as of thoſe who ſleep in the Day, and go abroad in the Night, and of ſuch as keep ſuſpicious Company, and of ſuch as are generally ſuſpected to be Robbers, *&c.* and of Eves-Droppers, and common Drunkards, and all other Perſons, whoſe Misbehaviour may reaſonably be intended to bring them within the Meaning of the Statute, as Perſons of evil Fame, who, being deſcribed by an Expreſſion of ſo great Latitude, ſeem in a great Meaſure to be left to the Judgment of the Magiſtrate. But if he commit one for want of Sureties, he muſt ſhew the Cauſe, *&c.* with convenient Certainty.

Palm. 129, 130.

Sect. 5. As to the ſecond Point, *viz.* For what Misbehaviours ſuch a Recognizance ſhall be forfeited, it is laid down as a general Rule in the Argument of *Stamp* and *Hide*'s Caſe, That whatever will be a good

auſe to bind a Man to his Good Behaviour, will forfeit a Recognizance Cro. Ca. 499
r it, yet this is ſince denied in *Heyward*'s Caſe; and indeed does by no
leans ſeem to be maintainable, becauſe the Statute in ordering Perſons of
il Fame to be bound in this Manner, ſeems in many Caſes chiefly to re-
ard the Prevention of that Miſchief which they may juſtly be ſuſpected to
e likely to do; and in that Reſpect requires them to ſecure the Publick
om that Danger which may probably be apprehended from their future
ehaviour, whether any actual Crime can be proved upon them, or not;
nd it would be extreamly hard in ſuch Caſes to make Perſons forfeit their
ecognizance, who yet may juſtly be compellable to give one, as thoſe who 13 H. 7. 10. b.
eep ſuſpicious Company, or thoſe who ſpend much Money idly, without Dalt. ca. 75.
aving any viſible Means of getting it honeſtly, or thoſe who lie under a
eneral Suſpicion of being Rogues, *&c.*

Sect. 6. However, it ſeems that ſuch a Recognizance ſhall not only be
rfeited for ſuch actual Breaches of the Peace, for which a Recognizance for 2 H. 7. 2. b.
e Peace may be forfeited, but alſo for ſome others, for which ſuch a Re-
ognizance cannot be forfeited; as for going armed with great Numbers to
e Terror of the People, or ſpeaking Words tending to Sedition, *&c.* and
ſo for all ſuch actual Miſbehaviours which are intended to be prevented Cro. Ca. 499.
y ſuch a Recognizance, but not for barely giving Cauſe of Suſpicion of
hat perhaps may never actually happen.

CHAP. LXII.

Of Aſſaults and Batteries.

AND now I am come to conſider the ſeveral Kinds of actual Diſtur-
bances of the Peace, and theſe are; either,

1. Such as may be committed by one or two Perſons.
2. Such as require a greater Number.

Thoſe which may be committed by one or two Perſons, are,

1. Aſſaults and Batteries.
2. Affrays.
3. Forcible Entries and Detainers.

As to Aſſaults and Batteries, I ſhall conſider the following Particulars:

1. What ſhall be ſaid to be an Aſſault.
2. What ſhall be ſaid to be a Battery.
3. In what Caſes they may be juſtified.
4. In what Manner they are to be puniſhed.

Sect. 1. As to the firſt Point, it ſeems that an Aſſault is an Attempt, Pulton 4. a.
r Offer, with Force and Violence, to do a corporal Hurt to another; as
y ſtriking at him with, or without, a Weapon; or preſenting a Gun 6 Mod. 173,
t him, at ſuch a Diſtance to which the Gun will carry, or pointing a 174.
itch-fork at him, ſtanding within the Reach of it; or by holding up 2 R. A. 545,
10, 11.

1 Vent. 256. 1 Mod. 3. 1 Keb. 921. 40 Ed. 3. 40. a. 42 Ed. 3. 7. a. 45 Ed. 3. 24. b. 25. a. 22 Aſſ. 60. 2 R. A. 545. Pl. 1, 2, 3, 4, 5, 6, 7, 8. 22 Aſſ. Pl. 11. Pult. 3. Lamb. 126. [a] Salk. 384. 6 Mod. 149, 172. 1 Mod. 3. 3 Lev. 404. Skin. 387. 2 R. A. 546. Pl. 1, 2. 6 Mod. 172.

one's Fiſt at him, or by any other ſuch like Act done in an angry threatening Manner; and from hence it clearly follows, That one charged with an Aſſault and Battery, may be found guilty of the former, and yet acquitted of the latter. But [a] every Battery includes an Aſſault, therefore on an Indictment of Aſſault and Battery, in which the Aſſault is ill laid, if the Defendant be found guilty of the Battery, it is ſufficient. Notwithſtanding the many ancient Opinions to the contrary, it ſeems agreed at this Day, that no Words whatſoever can amount to an Aſſault.

Sect. 2. As to the ſecond Point, *viz.* What ſhall be ſaid to be a Battery, it ſeems that any Injury whatſoever, be it never ſo ſmall, being actually done to the Perſon of a Man, in an angry, or revengeful, or rude, or inſolent Manner, as by Spitting in his Face, or any Way touching him in Anger, or violently juſtling him out of the Way, are Batteries in the Eye of the Law: But it is ſaid to be no Battery to lay one's Hand gently on another whom an Officer has a Warrant to arreſt, and to tell the Officer that this is the Man he wants.

Sect. 3. As to the third Point, *viz.* In what Caſes an Aſſault and Battery may be juſtified, this is ſo fully ſet forth already in the Chapter of *Surety of the Peace*, that there ſeems to be no need of any farther Conſideration thereof in this Place; and therefore I ſhall only add, That where a Man in his own Defence beats another who firſt aſſaults him, *&c.* he may take an Advantage thereof upon an Indictment, as well as upon an Action; but with this Difference, that in the firſt Caſe he may give it in Evidence upon the Plea of Not guilty, and in the latter he muſt plead it ſpecially.

Sect. 4. As to the fourth Point, *viz.* How unlawful Aſſaults and Batteries are puniſhed, there is no doubt but that the Wrong-doer is ſubject, both to an Action at the Suit of the Party, wherein he ſhall render Damages, *&c.* and alſo to an Indictment at the Suit of the King, wherein he ſhall be fined according to the Heinouſneſs of the Offence.

CHAP. LXIII.

Of Affrays.

IN treating of Affrays, I ſhall conſider,

1. What ſhall be ſaid to be an Affray.
2. How far it may be ſuppreſſed by a private Perſon.
3. How far by a Conſtable.
4. How far by a Juſtice of Peace.
5. In what Manner the ſeveral Kinds of Affrays may be puniſhed.

3 Inſt. 158. Dalt. ca. 8. Lamb. 125, 126.

Sect. 1. As to the firſt Point, it is ſaid, That the Word Affray is derived from the *French* Word *Effraier*, to terrify, and that in a legal Senſe it is taken for a publick Offence, to the Terror of the People, from whence it ſeems clearly to follow, That there may be an Aſſault which will not amount to an Affray; as where it happens in a private Place, out of the hearing or ſeeing of any, except the Parties concerned; in which Caſe it cannot be ſaid to be to the Terror of the People; and for this

is Cauſe ſuch a private Aſſault ſeems not to be inquirable in a Court- 4 H. 6. 10. a.
et, as all Affrays certainly are, as being common Nuſances. 8 Ed. 4. 5. b.

Sect. 2. Alſo it is ſaid, that no quarrelſome or threatening Words what- H. P. C. 135.
ever ſhall amount to an Affray; and that no one can juſtify laying his 23 E. 4. 45. b.
ands on thoſe who ſhall barely quarrel with angry Words, without Dalt. ch. 8.
ming to Blows; yet it ſeemeth, That the Conſtable may, at the Requeſt Lamb. Conſtable, 14.
the Party threatened, carry the Perſon, who threatens to beat him, be-
re a Juſtice of Peace, in Order to find Sureties.

Sect. 3. Alſo it is certain, That it is a very high Offence to challenge Poph. 158.
other, either by Word or Letter, to fight a Duel, or to be the Meſſenger 3 Inſt. 158.
ſuch a Challenge, or even barely to endeavour to provoke another to 1 Sid. 186.
nd a Challenge, or to fight; as by diſperſing Letters to that Purpoſe, full 1 Keb. 694.
Reflections, and inſinuating a Deſire to fight, *&c.* Hob. 120, 215.
2 Rol. Ab. 78.

Sect. 4. But granting that no bare Words, in the Judgment of Law,
ry in them ſo much Terror as to amount to an Affray; yet it ſeems cer-
n, That in ſome Caſes there may be an Affray where there is no actual Lamb. 126.
olence; as where a Man arms himſelf with dangerous and unuſual Wea- 3 Inſt. 160.
ns, in ſuch a Manner as will naturally cauſe a Terror to the People, 76. D.
hich is ſaid to have been always an Offence at Common Law, and is 2 Rol. Ab. 78.
ictly prohibited by many Statutes: For by 2 *Ed.* 3. 3. it is enacted, *That* Pl. 4.
Man, great nor ſmall, of what Condition ſoever he be, except the King's H. P. C. 137.
rvants, in his Preſence, and his Miniſters in executing of the King's Pre-
ts, or of their Office, and ſuch as be in their Company aſſiſting them, and
o upon a Cry made for Arms to keep the Peace, and the ſame in ſuch Places
ere ſuch Acts happen, be ſo hardy to come before the King's Juſtices, or o-
r of the King's Miniſters doing their Office, with Force and Arms, nor
ing no Force in Affray of Peace, nor to go nor ride armed by Night nor by
ay, in Fairs, Markets, nor in the Preſence of the Juſtices or other Mi-
ſters, nor in no part elſewhere, upon Pain to forfeit their Armour to the
ing, and their Bodies to Priſon, at the King's Pleaſure. And that the
ing's Juſtices in their Preſence, Sheriffs, and other Miniſters in their
iliwicks, Lords of Franchiſes, and their Bailiffs in the ſame, and Mayors
d Bailiffs of Cities and Boroughs, within the ſame Cities and Boroughs, and
rough-holders, Conſtables and Wardens of the Peace within their Wards,
ll have Power to execute this Act: And that the Juſtices aſſigned, at their
ming down into the Country, ſhall have Power to enquire how ſuch Officers
d Lords have exerciſed their Offices in this Caſe, and to puniſh them whom
ey find, that have not done that which pertained to their Office; and this
atute is farther enforced by 7 *Rich.* 2. 13. and 20 *Rich.* 2. 1.

And in the Expoſition of it, the following Points have been holden:

Sect. 5. I. That any Juſtice of Peace, or other Perſon, who is impow- F. N. B. 249.
ed to execute this Statute, may proceed thereon, either *ex Officio*, or by
orce of a Writ out of Chancery formed upon the Statute, and that if he 3 Inſt. 161.
nd any Perſon in Arms contrary to the Form of the Statute, he may ſeize Dal. ch. 22.
e Arms, and commit the Offender to Priſon; and that he ought alſo Lamb. 168, &c.
make a Record of his whole Proceeding, and certify the ſame into the Daliſ. 23.
hancery, where he proceeds by Force of the ſaid Writ, or into the 2 Bulſ. 330.
xchequer, where he proceeds *ex Officio*.

Sect. 6. II. That where a Juſtice of Peace, *&c.* proceeds upon the ſaid Cro. El. 294.
Writ, he may not only impriſon thoſe whom he ſhall find offending a- Con. Lamb. 170.
inſt the Statute in his own View, but alſo thoſe who ſhall be found
y an Inqueſt taken before him, to have offended in ſuch Manner in his
bſence; and I do not ſee why he may not do the ſame where he pro-
eeds *ex Officio*; for ſeeing the ſaid Writ hath no other Foundation but
the

the ſaid Statute, and is the moſt authentick Explication thereof, it ſeemeth that the Rules therein preſcribed, ſhould be the beſt Direction for all Proceedings upon that Statute.

Cro. El. 294. *Sect.* 7. III. That the Under-Sheriff may execute the ſaid Writ, being directed to the Sheriff, if it name him only by the Name of his Office, and not by his proper Name, and do not expreſly command him to act in his proper Perſon.

24 Ed. 3. 33. a. b. 21 H. 7. 39. a. 3 Inſt. 161, 162. Con. 2 Rol. 78. d. 2 H. 7. 39. a. 3 Inſt. 162. *Sect.* 8. IV. That a Man cannot excuſe the wearing ſuch Armour in Publick, by alledging that ſuch a one threatened him, and that he wears it for the Safety of his Perſon from his Aſſault; but it hath been reſolved, That no one ſhall incur the Penalty of the ſaid Statute for aſſembling his Neighbours and Friends in his own Houſe, againſt thoſe who threaten to do him any Violence therein, becauſe a Man's Houſe is as his Caſtle.

3 Mod. 117, 118. 2 Bulſt. 330. *Sect.* 9. V. That no Wearing of Arms is within the Meaning of this Statute, unleſs it be accompanied with ſuch Circumſtances as are apt to terrify the People; from whence it ſeems clearly to follow, That Perſons of Quality are in no Danger of offending againſt this Statute by wearing common Weapons, or having their uſual Number of Attendants with them, for their Ornament or Defence, in ſuch Places, and upon ſuch Occaſions, in which it is the common Faſhion to make uſe of them, without cauſing the leaſt Suſpicion of an Intention to commit any Act of Violence or Diſturbance of the Peace. And from the ſame Ground it alſo follows, That Crom. 64. a. Perſons armed with privy Coats of Mail to the Intent to defend themſelves againſt their Adverſaries, are not within the Meaning of this Statute, becauſe they do nothing *in terrorem populi*.

Poph. 121, 122. *Sect.* 10. VI. That no Perſon is within the Intention of the ſaid Statute, who arms himſelf to ſuppreſs dangerous Rioters, Rebels, or Enemies, and endeavours to ſuppreſs or reſiſt ſuch Diſturbers of the Peace or Quiet of the Realm; for Perſons who ſo arm themſelves, ſeem to be exempted out of the general Words of the ſaid Statute, by that Part of the Exception in the Beginning thereof, which ſeems to allow all Perſons to arm themſelves upon a Cry made for Arms to keep the Peace, in ſuch Places where ſuch Acts happen.

Lamb. 131. 3 Inſt. 158. H. P. C. 131. 2 Inſt. 52. 22 E. 4. 44. b. Dalt. ca. 8. Lamb. 131. Infra 17. *Sect.* 11. As to the ſecond Point, *viz.* How far an Affray may be ſuppreſſed by a private Perſon, it ſeems agreed, That any one who ſees others fighting, may lawfully part them, and alſo ſtay them till the Heat be over, and then deliver them to the Conſtable, who may carry them before a Juſtice of Peace, in order to their finding Sureties for the Peace: Alſo it is ſaid, That any private Perſon may ſtop thoſe whom he ſhall ſee coming to join either Party; and from hence it ſeems clearly to follow, That if a Man receive a Hurt from either Party in thus endeavouring to preſerve the Peace, he ſhall have his Remedy by an Action againſt him; alſo upon the

3 Inſt. 138. Con. Lamb. 131. Dalt. cap. 8. ſame Ground it ſeems equally reaſonable, That if he unavoidably happen to hurt either Party, in thus doing what the Law both allows and commends, he may well juſtify it, inaſmuch as he is no way in Fault; and the Damage done to the other, was occaſioned by a laudable Intention to do him a Kindneſs.

Lamb. 131. Dalt. cap. 8. 3 Inſt. 158. Bro. Faux. Impriſonment 35, 44. H. P. C. 135. 10 H. 7. 20. 2 Inſt 52. *Sect.* 12. However it ſeems clear, That if either Party be dangerouſly wounded in ſuch an Affray, and a Stander-by, endeavouring to arreſt the other, be not able to take him without hurting, or even wounding him, yet he is no way liable to be puniſhed for the ſame, inaſmuch as he is bound under Pain of Fine and Impriſonment, to arreſt ſuch an Offender, and either detain him till it appear whether the Party will live or die, or carry him before a Juſtice of Peace, by whom he either is to be bailed or committed, *&c.*

Sect. 13. As to the third Point, *viz.* How far an Affray may be ſup-
ſſed by a Conſtable; it ſeems agreed, That a Conſtable is not only im-
wer'd, as all private Perſons are, to part an Affray which happens in his 3 Inſt. 158.
eſence, but is alſo bound at his Peril to uſe his beſt Endeavours to this H. P. C. 135.
rpoſe, and not only to do his utmoſt himſelf, but alſo to demand the Lamb. 132, 133.
iſtance of others, which if they refuſe to give him, they are puniſhable Dalt. cap. 8.
th Fine and Impriſonment. 3 H. 7. 10. b.

Sect. 14. And it is ſaid, That if a Conſtable ſee Perſons either actual-
engaged in an Affray, as by Striking, or offering to ſtrike, or drawing Lamb. 132,
ir Weapons, *&c.* or upon the very Point of entering upon an Affray, 133.
where one ſhall threaten to kill, wound, or beat another, he may either Dalt. ca. 1, 8.
ry the Offender before a Juſtice of Peace, to the End that ſuch Ju- H. P. C. 136.
e may compel him to find Sureties for the Peace, *&c.* or he may im- Dalt. cap. 1, 8.
ſon him of his own Authority for a reaſonable Time, till the Heat ſhall Bro. Surety, 23, 36.
over, and alſo afterwards detain him till he find ſuch Surety by Obliga- Cro. El. 375.
n: But it ſeems, That he has no Power to impriſon ſuch an Offender 9 Ed. 4. 26. a.
any other Manner, or for any other Purpoſe; for he cannot juſtify the Moor 284.
mmitting an Affrayer to Gaol till he ſhall be puniſhed for his Offence: Pl. 436.
d it is ſaid, That he ought not to lay Hands on thoſe, who barely con- 3 H. 4. 9. a.
d with hot Words, without any Threats of perſonal Hurt, and that all 22 Ed. 4. 35. b.
ich he can do in ſuch a Caſe, is to command them under Pain of Im- 10 Ed. 4. 18.
ſonment to avoid Fighting. 5 H. 7. 6. a.
Savil 97, 98.

Sect. 15. But he is ſo far intruſted with a Power over all actual Af- 5 H. 7. 6. a.
ys, that though he himſelf is a Sufferer by them, and therefore liable H. P. C. 136.
be objected againſt, as likely to be partial in his own Cauſe, yet he may 1 Rol. Re. 238.
preſs them; and therefore, if an Aſſault be made upon him, he may 2 Bulſt. 329.
only defend himſelf, but alſo impriſon the Offender, in the ſame Man-
as if he were no way a Party.

Sect. 16. And if an Affray be in a Houſe, the Conſtable may break 13 Ed. 4. 9. a.
n the Doors to preſerve the Peace; and if Affrayers fly to a Houſe 7 Ed. 3. 12. b.
he follow with freſh Suit, he may break open the Doors to take Dalt. cap. 8, 67.
m. Lamb. 133, 134.

Sect. 17. But it is ſaid, That a Conſtable hath no Power to arreſt a H. P. C. 135.
n for an Affray done out of his own View, without a Warrant from Cro. El. 375.
uſtice of Peace, unleſs a Felony were done or likely to be done; for Owen 105.
is the proper Buſineſs of a Conſtable to preſerve the Peace, not to pu- H. P. C. 92, 136.
h the Breach of it; nor does it follow from his having Power to com-
thoſe to find Sureties who break the Peace in his Preſence, that he has
ſame Power over thoſe who break it in his Abſence, inaſmuch as in
h Caſe it is moſt proper to be done by thoſe who may examine the
ole Circumſtances of the Matter upon Oath, which a Conſtable cannot
; yet it is ſaid, That he may carry thoſe before a Juſtice of Peace, who Lamb. 131.
re arreſted by ſuch as were preſent at an Affray, and delivered by them Dalt. cap. 8.
o his Hands.

Sect. 18. As to the fourth Point, *viz.* In what Manner an Affray may
ſuppreſſed by a Juſtice of Peace; there is no Doubt, but that he may H. P. C. 136.
d muſt do all ſuch Things to that Purpoſe, which a private Man or Dalt. cap. 8.
nſtable are either enabled, or required by the Law to do: But it is ſaid, Bro. Falſe Impriſonment, 6, 12, 33.
hat he cannot without a Warrant authorize the Arreſt of any Perſon for 14 H. 8. 7.
Affray out of his View; yet it ſeems clear, that in ſuch Caſe he may Moor 468.
ake his Warrant to bring the Offender before him, in order to compel him Pl. 551.
find Sureties for the Peace.

Sect. 19. Alſo it ſeems, That a Juſtice of Peace has a greater Power over one who hath dangerouſly wounded another in an Affray, than either a private Perſon or a Conſtable; for there does not ſeem to be any good Authority, that theſe have any Power at all to take Sureties of ſuch an Offender; but it ſeems certain, That a Juſtice of the Peace has a diſcretionary Power either to commit him or to bail him, till the Year and Day be paſt; but it is ſaid, that he ought to be very cautious how he takes Bail, if the Wound be dangerous; for that if the Party die, and the Offender appear not, he is in Danger of being ſeverely fined, if he ſhall appear upon the whole Circumſtances of the Caſe to have been too favourable.

See 38 Ed. 3. 6. b. 7. a. 22 Aſſ. 56. 5 Mod. 84. H. P. C. 36. Dalt. cap. 8. Poph. 153.

Sect. 20. As to the fifth Point, *viz.* In what Manner the ſeveral kinds of Affrays are to be puniſhed, it ſufficiently appears from the foregoing Part of this Chapter, how ſuch Affrays as are accompanied with Force and Arms, are to be dealt with upon the Statute of *Northampton*; and therefore I ſhall only examine in this Place, what Penalties other Affrays are liable unto, as to which it is to be obſerved, That all Affrays in general are puniſhable by Fine and Impriſonment, the Meaſure of which is to be regulated by the Diſcretion of the Judges according to the Circumſtances of the Caſe, which very much vary the Nature of this Crime, and in ſome Caſes make it ſo inconſiderable as ſcarce to deſerve to be taken Notice of; and in others make it an Offence of a very heinous Nature, as in the following Inſtances:

Aleyn 79.

1. In Reſpect of the dangerous Tendency thereof.
2. In Reſpect of the Perſons againſt whom it is committed.
3. In Reſpect of the Place wherein it happens.

Sect. 21. And firſt, an Affray may receive an Aggravation from the dangerous Tendency thereof, as where Perſons coolly and deliberately engage in a Duel, which cannot but be attended with the apparent Danger of Murder, and is not only an open Defiance of the Law, but carries with it a direct Contempt of the Juſtice of the Nation, as putting Men under a Neceſſity of righting themſelves; upon which Conſiderations, Perſons convicted of barely ſending a Challenge, have been adjudged to pay a Fine of one hundred Pounds, and to be impriſoned for one Month without Bail, and alſo to make a publick Acknowledgment of their Offence, and to be bound to their good Behaviour.

Poph. 153. 3 Inſt. 158. 1 Sid. 186. 1 Keb. 694. Moor 563. Pl. 763.

Sect. 22. Secondly, An Affray may receive another Aggravation from the Perſons againſt whom it is committed; as where the Officers of Juſtice are violently diſturbed in the due Execution of their Office, as by the Reſcous of a Perſon legally arreſted, or the bare Attempt to make ſuch a Reſcous; for all the Miniſters of the Law are under its more immediate Protection.

Sect. 23. Thirdly, An Affray may receive a farther Aggravation from the Place wherein it is committed, and upon this Reſpect all Affrays in the King's Court are ſo ſeverely puniſhed, as hath been ſhewn already in Chapter 21, and upon the ſame Account alſo, all Affrays in a Church or Church-yard, have been always eſteemed very heinous Offences, as being great Indignities to the Divine Majeſty, to whoſe Worſhip and Service ſuch Places are immediately dedicated. And upon this Conſideration all irreverent Behaviour in theſe Places hath been eſteemed ſo criminal by the Makers of our Laws, that they have not only ſeverely puniſhed ſuch Diſturbances in them which are puniſhable where-ever they happen, as all actual Affrays, &c. but alſo ſuch, which if they happen elſewhere

12 Co. 101. 1 Keb. 290, 491. 1 Mod. 186.

re not puniſhable at all; as bare quarrelſome Words, and even ſuch which ould be commendable if done in another Place; as Arreſts by Virtue of gal Proceſs: But for the better Underſtanding hereof, I ſhall conſider the veral Statutes made for this Purpoſe.

Sect. 24. And firſt, it is enacted by 5 and 6 *Ed.* 6. 4. *That if any Per-n whatſoever, ſhall by Words only quarrel, chide, or brawl, in any Church or hurch-yard, that then it ſhall be lawful unto the Ordinary of the Place where he ſame Offence ſhall be done, and proved by two lawful Witneſſes, to ſuſpend very Perſon ſo offending; that is to ſay, if he be a Layman,* ab ingreſſu Ec-leſiæ, *and if he be a Clerk from the Miniſtration of his Office, for ſo long ime as the ſame Ordinary ſhall by his Diſcretion think meet and convenient, ccording to the Fault.*

Sect. 25. And it is further enacted by the ſaid Statute, *That if any Per-n ſhall ſmite or lay any violent Hands upon any other, either in any Church or hurch-yard; that then,* ipſo Facto, *every Perſon ſo offending ſhall be deemed ccommunicate, and be excluded from the Fellowſhip and Company of Chriſt's ongregation.*

Sect. 26. And it is alſo further enacted by the ſaid Statute, *That if any erſon ſhall maliciouſly ſtrike any Perſon with any Weapon in any Church or hurch-yard, or ſhall draw any Weapon in any Church or Church-yard, to the ntent to ſtrike another with the ſame Weapon; that then every Perſon ſo of-nding, and thereof being convicted by Verdict of twelve Men, or by his own onfeſſion, or by two lawful Witneſſes, before the Juſtices of Aſſize, Juſtices f Oyer and Terminer, or Juſtices of Peace in their Seſſions, by Force of this ct, ſhall be adjudged by the ſame Juſtices before whom ſuch Perſon ſhall be nvicted, to have one of his Ears cut off,* &c. *and beſides that every ſuch erſon to be, and ſtand* ipſo Facto *excommunicated, as aforeſaid.*

And in the Expoſition hereof it hath been holden:

Sect. 27. I. That notwithſtanding the Words of the Statute be expreſ-ed, That he who ſmites another in the Church, *&c.* ſhall, *ipſo Facto*, be eemed excommunicate; yet there ought either to be a precedent Convic-ion at Law, which muſt be tranſmitted to the Ordinary, or elſe the Ex- Dyer 275. ommunication muſt be declared in the Spiritual Court upon a proper Proof Pl. 48. f the Offence there; for it is implied in every Penal Law, that no one Cro. Ja. 462. hall incur the Penalty thereof, till he be found guilty upon a lawful Trial; 1 Vent. 146. lſo it muſt be intended in the Conſtruction of this Statute, that the Ex- Lit. 149. Hett. 86. communication ought to appear Judicially, for otherwiſe there could be no Cro. El. 919. Abſolution.

Sect. 28. II. That he who ſtrikes another in a Church, *&c.* can no way Cro. Ja. 367. excuſe himſelf, by ſhewing that the other aſſaulted him.

Sect. 29. III. That Church-wardens, or perhaps private Perſons, 1 Saund. 13, who whip Boys for playing in the Church, or pull off the Hats of thoſe 14. who obſtinately refuſe to take them off themſelves, or gently lay their 1 Sid. 301. Hands on thoſe who diſturb the Performance of any Part of divine Ser- 3 Keb. 124. vice, and turn them out of the Church, are not within the Meaning of 1 Mod. 168. the Statute.

Sect. 30. Alſo it is enacted by 1 *Ma.* Seſſ. 2. cap. 3. *That if any Per-ſon or Perſons, of their own Power and Authority, ſhall willingly and of Purpoſe by open and overt Word, Fact, Act, or Deed, maliciouſly or contemptuouſly moleſt, let, diſturb, vex or trouble, or by any other unlawful Ways and Means, diſquiet, or miſuſe, any Preacher who ſhall be licenced, allowed, or authorized to preach by the Queen's Highneſs, or by any Archbiſhop, or Biſhop of this Realm, or by any other lawful Ordinary, or by any of the Univerſities of* Oxford *and* Cam-bridge, *or otherwiſe lawfully authorized or charged, by Reaſon of his or their*

Cure, Benefice, or other Spiritual Promotion or Charge, in any of his, or their open Sermon, &c. *or if any Person or Persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any Parson, Vicar, Parish-Priest, or Curate, or any lawful Priest, preparing, saying, doing, singing, ministring or celebrating the Mass, or other such divine Service, Sacraments, or Sacramentals, as was most commonly frequented and used in the last Year of the Reign of the late Sovereign Lord King* Henry *the Eighth, or that at any Time hereafter should be allowed, set forth, or authorized by the Queen's Majesty; or if any Person or Persons shall unlawfully, contemptuously, or maliciously, of their own Power or Authority, pull down, deface, spoil, or otherwise break any Altar or Altars, or any Crucifix, or Cross, in any Church, Chapel, or Church-yard; every such Offender and Offenders, his or their Aiders, Procurers or Abettors, may be apprehended by any Constable, or Church-warden of the Place where such Offence shall be committed, or by any other Officer or Person then being present at the Time of the said Offence; and being so apprehended shall be brought before some Justice of Peace by whom they shall be committed forthwith and within six Days the Matter shall be examined by the same, together with some other Justices; and on Proof by two Witnesses or Confession, the Offender shall be committed for three Months, and also till the next Quarter-Sessions, where, if they repent, they shall be discharged upon giving Sureties for their good Behaviour for a Year, and if they do not repent they shall be committed till they do.*

2 Jon. 159. Con. Aleyn 50. 2 Bulst. 51.

Sect. 31. It hath been resolved, That the Disturbance of a Minister in saying the present Common Prayer is within this Statute; for the express Mention of such Divine Service, as should afterwards be authorized by Queen *Mary*, doth implicitly include such also as should be authorized by her Successors; for since the King never dies, a Prerogative given generally to one, goes of Course to others.

Sect. 32. Also it is enacted by 1 *Will.* and *Mar.* 18. Par. 19. *That if any Person shall willingly and of Purpose, maliciously or contemptuously come into any Cathedral or Parish Church, Chapel, or other Congregation permitted by the said Act, and disquiet or disturb the same, or misuse any Preacher or Teacher, such Persons, upon Proof before any Justice of Peace, by two or more sufficient Witnesses, shall find two Sureties to be bound by Recognizance in the penal Sum of fifty Pounds, and on Default of such Sureties shall be committed to Prison, there to remain till the next General or Quarter-Sessions, and upon Conviction of the said Offence at the said General or Quarter-Sessions, shall suffer the Pain and Penalty of twenty Pounds.*

CHAP. LXIV.

Of Forcible Entries and Detainers.

Lamb. 135. Dalt. cap. 76. Crom. 70. a.b.

Sect. 1. IT seems that at the Common Law a Man disseised of any Lands, or Tenements, (if he could not prevail by fair Means,) might lawfully regain the Possession thereof by Force, unless he were put to a Necessity of bringing his Action, by having neglected to re-enter in due Time: And it seems certain, That even at this Day, he who is wrongfully dispossessed of his Goods, may justify the re-taking of them by Force from the Wrong-doer, if he refuse to re-deliver them; for the Violence which happens through the Resistance of the wrongful Possessor, being

Kellw. 92. Yelv. 172. Cro. Ja. 236. Supra Ch. 60. S. 23.

ng originally owing to his own Fault, gives him no juſt Cauſe of mplaint, inaſmuch as he might have prevented it by doing as he ght.

Sect. 2. But this Indulgence of the Common Law, in ſuffering Perſons regain the Lands, they were unlawfully deprived of, having been found Experience to be very prejudicial to the publick Peace, by giving an pportunity to powerful Men, under the Pretence of feigned Titles, for- ly to eject their weaker Neighbours, and alſo by Force to retain their rongful Poſſeſſions, it was thought neceſſary by many ſevere Laws to train all Perſons from the Uſe of ſuch violent Methods of doing them- ves Juſtice.

Sect. 3. However, even at this Day, in an Action of Forcible Entry ounded on thoſe Laws, if the Defendant make himſelf a Title which is nd for him, he ſhall be diſmiſſed without any Inquiry concerning the rce; for howſoever he may be puniſhable at the King's Suit, for doing at is prohibited by Statute, as a Contemner of the Laws, and Diſturber the Peace, yet he ſhall not be liable to pay any Damages for it to the intiff, whoſe Injuſtice gave him the Provocation in that Manner to right nſelf.

17 H. 7. 17. a. b. 21 H. 6. 39. b. F.N.B. 249. d. Bro. Force, 5, 11, 29.

Sect. 4. Since therefore Offences of this Nature are made ſuch, not by Common Law, but by Statute; I ſhall for the better Underſtanding reof, conſider the ſeveral Statutes relating to this Subject.

Sect. 5. And firſt, I find it agreed, That by 2 *Ed.* 3. which is com- nly called the Statute of *Northampton*; if there be any Uſe made of ms to ſtrike a Terror into the Perſons upon whom a Forcible Entry is de, any Juſtice of Peace or other Officer, who is within the Purview that Statute, may both ſeize the Arms for the King's Uſe, and alſo priſon the Offenders, but not reſtore the Party injured to his Poſſeſ- n; but the ſaid Statute having been fully ſet forth in the foregoing apter, I ſhall proceed to thoſe Statutes which more directly relate to s Matter.

3 Inſt. 161. Crom. 162. a. Dalt. cap. 80.

Sect. 6. And firſt it is enacted by 5 *Rich.* 2. 7. in the following Words, *nd alſo the King defendeth, That none from henceforth make any Entry into y Lands and Tenements, but in Caſe where Entry is given by the Law; d in ſuch Caſe not with ſtrong Hand, nor with Multitude of People, but ly in peaceable and eaſy Manner. And if any Man from henceforth do to contrary, and thereof be duly convict, he ſhall be puniſhed by Impriſon- nt of his Body, and thereof ranſomed at the King's Will.*

Sect. 7. But this Statute being found by Experience not ſufficiently to ve provided againſt the Miſchief intended to be redreſſed by it, inaſmuch it gave no ſpeedy Remedy to the Party injured, againſt the Wrong-doer, t left him to the common Courſe of proceeding by way of Indictment or ction, and made no Proviſion at all againſt Forcible Detainers, it was ought neceſſary to ſupply theſe Defects by other additional Laws; and to is Purpoſe it was farther enacted by 15 *Rich.* 2. ch. 2. *That the ſaid Sta- te and all others made againſt Forcible Entries,* &c. *ſhall be fully execu- d; and farther, That at all Times that ſuch Forcible Entries ſhall be made, d Complaint thereof cometh to the Juſtices of Peace, or to any of them, at the ſame Juſtices or Juſtice take ſufficient Power of the County, and go the Place where the Force is made; and if they find any that hold ſuch lace forcibly, after ſuch Entry made, they ſhall be taken and put in the next aol, there to abide convict by the Record of the ſame Juſtices or Juſtice, until ey have made Fine and Ranſom to the King. And that all the People of the unty, as well the Sheriff as others, ſhall be attendant upon the ſame Juſtices,*

to go and aſſiſt the ſame Juſtices to arreſt ſuch Offenders, upon Pain of Impriſonment, and to make Fine to the King: And in the ſame Manner it ſhall be done of them that make ſuch Forcible Entries in Benefices or Offices of Holy Church.

8 Co. 121. a. Dalt. cap. 22.

Sect. 8. In the Expoſition of this Statute it hath been holden, That one Juſtice of Peace may make a Record of ſuch a forcible Holding, and that ſuch Record is not traverſable, becauſe the Juſtice of Peace in making thereof, acts not as a Miniſter, but as a Judge: Alſo it hath [a] lately been ſolemnly reſolved in Colonel *Leighton*'s Caſe, That the ſame Juſtice may aſſeſs the Fine for this Offence, either before the Time of Conviction, or after; but it is ſaid, That ſuch Juſtice of Peace hath no Power to commit the Offender to Gaol, unleſs he do it immediately upon the Fact, or unleſs the Offender ſhall afterwards refuſe to find Sureties for his good Behaviour. Alſo it was holden by the Court in *Leighton*'s Caſe above mentioned, That if a Perſon againſt whom a Complaint ſhall be made as having been guilty of a Forcible Entry, ſhall either traverſe the Entry or the Force, or plead that he has been three Years in Poſſeſſion, the Juſtice may ſummon a Jury for the Trial of ſuch Traverſe, for it is impoſſible to determine it upon View; and if the Juſtice have no Power to try it, it would be eaſy for any one to elude the Statute by the Tender of ſuch a Traverſe, and therefore by a neceſſary Conſtruction, the Juſtice muſt needs have this Power as incidental to what is expreſly given him.

Lamb. 151. Dalt. cap. 22. [a] B. R. Hill. 1708. Salk. 353. Kellw. 41. 8. Crom. 195. b. 196. Dalt. cap. 22. Moore 848.

Salk. 353.

Sect. 9. But this Statute being likewiſe very defective in many Reſpects, as in not giving any Remedy againſt thoſe who were guilty of a Forcible Detainer after a peaceful Entry; nor even againſt thoſe who were guilty of both a Forcible Entry and Forcible Detainer, if they were removed before the coming of a Juſtice of Peace; and in not giving the Juſtices of the Peace any Power to reſtore the Party injured by ſuch Force to his Poſſeſſion; and alſo in not fixing any Pain on the Sheriff for not obeying the Precepts of the Juſtices in the Execution of the ſaid Statutes; it was farther enacted by 8 *H.* 6. 9. *That from henceforth where any doth make any Forcible Entry in Lands and Tenements, or other Poſſeſſions, or them hold forcibly, after Complaint thereof made within the ſame County where ſuch Entry is made, to the Juſtices of the Peace, or to one of them, by the Party grieved, that the Juſtices or Juſtice ſo warned, within a convenient Time, ſhall cauſe, or one of them ſhall cauſe, the ſaid Statute to be duly executed, and that at the Coſts of the Party ſo grieved.*

Sect. 10. And it is farther enacted by the ſaid Statute, *That though ſuch Perſons making ſuch Entries be preſent, or elſe departed before the coming of the ſaid Juſtices or Juſtice, notwithſtanding the ſame Juſtices or Juſtice in ſome good Town next to the Tenements ſo entered, or in ſome other convenient Place according to their Diſcretion, ſhall have, and either of them ſhall have Authority and Power to enquire by the People of the ſame County, as well of them that make ſuch Forcible Entries in Lands and Tenements, as of them which the ſame hold with Force. And if it be found before any of them, that any doth contrary to this Statute, then the ſaid Juſtices or Juſtice ſhall cauſe to reſeize the Lands and Tenements ſo entered or holden as afore, and ſhall put the Party ſo put out, in full Poſſeſſion of the ſame Lands and Tenements ſo entered or holden as before.*

Sect. 11. And it is farther enacted by the ſaid Statute, *That when the ſaid Juſtices or Juſtice make ſuch Inquiries as before, they ſhall make, or one of them ſhall make, their Warrants and Precepts to be directed to the Sheriff of the ſame County, commanding him of the King's Behalf, to cauſe to come before them and every of them, ſufficient and indifferent Perſons, dwelling next about the Lands ſo entered as before, to enquire of ſuch Entries, whereof every Man which*

ll be impanelled to enquire in this Behalf, ſhall have Land or Tenement of yearly Value of forty Shillings by the Year at the leaſt, above Reprizes, d that the Sheriff return Iſſues upon every of them at the Day of the firſt recept returnable, twenty Shillings, and at the ſecond Day forty Shillings, d at the third Time an hundred Shillings, and at every Day after the uble. And if any Sheriff or Bailiff within a Franchiſe having Return of e King's Writ, be ſlack, and make not Execution duly of the ſaid Precepts him directed to make ſuch Enquiries, that he ſhall forfeit to the King twenty ounds for every Default, and moreover ſhall make Fine and Ranſome to the ing. And that as well the Juſtices or Juſtice aforeſaid, as the Juſtices of ſizes ſhall have Power to hear and determine ſuch Defaults of the ſaid She- ffs and Bailiffs, at the Suit of the King, or of the Party grieved, &c.

Sect. 12. And it is farther enacted by the ſaid Statute, *That Mayors, Ju- ces or Juſtice of Peace, Sheriffs and Bailiffs of Cities, Towns and Boroughs ving Franchiſe, have in the ſaid Cities, Towns, and Boroughs, like Power to move ſuch Entries, and in other Articles aforeſaid, riſing within the ſame, as e Juſtices of Peace, and Sheriffs in Counties and Countries aforeſaid have.*

Sect. 13. But it is provided by the ſaid Statute, *That they who keep their oſſeſſions with Force in any Lands and Tenements, whereof they or their An- ſtors, or they whoſe Eſtate they have in ſuch Lands and Tenements, have ntinued their Poſſeſſions in the ſame by three Years or more, be not endamaged Force of this Statute.*

Sect. 14. And the ſaid Proviſo was farther enforced and explained by 31 *l.* 11. by which it is declared and enacted, *That no Reſtitution upon any In- ctment of Forcibly Entry, or holding with Force, be made to any Perſon, if e Perſon ſo indicted, hath had the Occupation, or been in quiet Poſſeſſion, r the Space of three whole Years together, next before the Day of ſuch Indict- ent ſo found, and his Eſtate therein not ended; which the Party indicted ay alledge for Stay of Reſtitution, and Reſtitution to ſtay till that be tried, if e other will deny or traverſe the ſame: And if the ſame Allegation be tried a- ainſt the ſame Perſon ſo indicted, he is to pay ſuch Coſts and Damages to the her Party, as ſhall be aſſeſſed by the Judges or Juſtices before whom the me ſhall be tried; the ſame Coſts and Damages to be recovered and levied, s is uſual for Coſts and Damages contained in Judgments upon other Actions.*

Sect. 15. In the Conſtruction of theſe Statutes it was holden, That if a Leſſee for Years or Copyholder were ouſted, and the Leſſor or Lord diſ- eized, and ſuch Ouſter as well as Diſſeiſin were found in an Indictment of Forcible Entry, the Court might in their Diſcretion award a Reſtitution of Poſſeſſion to ſuch Leſſee or Copyholder, which was by neceſſary Conſe- quence a Reſeiſin of the Freehold alſo, whether the Leſſor or Lord had deſired or oppoſed it: But it was a great Queſtion, Whether a Leſſee for Years or a Copyholder, being ouſted by the Leſſor or Lord, could have a Reſtitution of their Poſſeſſion within the Equity of 8 *H.* 6. the Words whereof as to this Purpoſe are, that the Juſtice ſhall re-ſeize the Lands, *&c.* by which it ſeems to be implied, That the Party muſt be ouſted of ſuch an Eſtate therein, whereof he may be ſaid to be ſeiſed, which muſt be a Freehold at leaſt.

Crom. 161. b. 166. b. Yelv. 81. Con. 1 Leon. 327. Lamb. 155. Crom. 71. Dalt. cap. 77. Savil 68. Pl. 141. Far. 123.

Sect. 16. But to remove this Doubt, it is enacted by 21 *Jac.* 1. 15. *That ſuch Judges, Juſtices, or Juſtice of the Peace, as by reaſon of any Act or Acts of Parliament then in force, were authorized and enabled upon Enquiry, to give Reſtitution of Poſſeſſion unto Tenants, of any Eſtate of Freehold, of their Lands or Tenements, which ſhall be entered upon with Force, or from them with- holden by Force, ſhall by Reaſon of that Act have the like, and the ſame Autho- rity and Ability from thenceforth (upon Indictment of ſuch Forcible Entries, or forcible with-holding before them duly found) to give like Reſtitution of Poſ-*

ſeſſion

ſeſſion unto Tenants for Term of Years, Tenants by Copy of Court-Roll, Guardians by Knights-Service, Tenants by Elegit, *Statute-Merchant, and Staple of Lands or Tenements, by them ſo holden, which ſhall be entered upon by Force, or holden from them by Force.*

Latch 182. See Co. Litt. 61. *Sect.* 17. But it hath been holden, that a Tenant by the Verge is not within this Statute, becauſe he is not within the expreſs Words; *ſed Quære*, for ſince ſuch Perſon hath no other Evidence of his Title, but by the Copy of Court-Roll, he ſeems at leaſt to be within the Meaning, if not within the Words, of the Statute; however it ſeems clear, That if a Leſſor eject his Leſſee for Years, and afterwards be forcibly put out of Poſſeſſion again by ſuch Leſſee, he hath no Remedy for a Reſtitution by Force of any of the above mentioned Statutes, for he cannot have it by 8 *H.* 6. becauſe he always continued ſeized of the Freehold, and clearly he is not within 21 *Jac.* 1. 15.

Vide Sal. 587. Crom. 71. a. 166. b. Dal. ch. 77.

Lamb. 155. Crom. 71. a. Dal. ch. 77. 2 Keb. 495. *Sect.* 18. However there ſeems to be no Doubt, but that a Juſtice of Peace, *&c.* may in either of the ſaid Caſes, remove the Force and commit the Offender, *&c.*

Sect. 19. Having thus ſet forth the ſeveral Statutes relating to this Subject, together with the Miſchiefs which occaſioned them, and the ſeveral Defects of each of them, I ſhall, for the better Underſtanding of them all in general, proceed to examine the following Particulars:

1. What ſhall be eſteemed an Entry within theſe Statutes.
2. What Entry is to be adjudged forcible.
3. What Detainer.
4. In reſpect of what Kind of Poſſeſſions one may be guilty of ſuch forcible Entry or Detainer.
5. What Perſons may be guilty thereof.
6. What ought to be the Form of a Record grounded upon theſe Statutes.
7. Of what Kind of Poſſeſſions a Reſtitution is to be awarded.
8. To whom ſuch Reſtitution ought to be made.
9. By whom, and in what Manner, it is to be awarded and given.
10. In what Caſes it may be barred by the Continuance of a Poſſeſſion for three Years.
11. For what other Cauſes it may be ſtayed.
12. How it may be ſuperſeded before it is executed.
13. How it may be ſet aſide after it is executed.

Sect. 20. As to the firſt Point, *viz.* What ſhall be eſteemed an Entry within theſe Statutes, it ſeems certain, That if one who pretends a Title to Lands, barely go over them, either with, or without a great Number of Attendants, armed or unarmed, in his Way to the Church, or Market, or for ſuch like Purpoſe, without doing any Act, which either expreſly or impliedly amounts to a Claim of ſuch Lands, he cannot be ſaid to make an Entry thereinto within the Meaning of theſe Statutes.

Crom. 70. b. Dal. ch. 77.

Crom. 69. Dal. ch. 77. Con. Cro. Ca. 486. *Sect.* 21. Yet in ſuch Caſe, if he make an actual Claim with any Circumſtances of Force or Terror, he ſeems to be guilty of a forcible Entry within 1 & 15 *Ric.* 2. whether his Adverſary actually quit his Poſſeſſion or not.

Crom. 69. a. Dal. ch. 77. B. 2. ch. 29. Sect. 4. *Sect.* 22. Alſo all thoſe who accompany a Man when he makes a forcible Entry, ſhall be adjudged to enter with him, within the Intent of theſe Laws, whether they actually came upon the Lands, or not.

ect. 23. So alſo ſhall thoſe who having an Eſtate in Land by a defea- Crom. 69. b.
Title, continue with Force in the Poſſeſſion thereof, after a Claim Dal. ch. 77.
e by one who had a Right of Entry thereto. Co. Lit. 256, 257.

ect. 24. But he who barely agrees to a forcible Entry made to his Uſe, Crom. 69. a.
hout his Knowledge or Privity, ſhall not be adjudged to make an En- Dal. ch. 77.
within theſe Statutes, becauſe he no way concurred in, or promoted 2 H. 7. 16. b.
Force.

Sect. 25. As to the ſecond Point, *viz.* What Entry is to be adjudged Lamb. 140, &c.
ible, it ſeems clear, that it ought to be accompanied with ſome Cir- Dalt. ch. 77.
nſtances of actual Violence or Terror; and therefore, That an Entry Co. Lit. 257. b.
ich hath no other Force than ſuch as is implied by the Law, in every
ſpaſs whatſoever, is not within theſe Statutes.

And therefore, for the better Underſtanding hereof, I ſhall conſider;

. In Reſpect of what Acts of Violence an Entry may be adjudged
ible.
2. In Reſpect of what Circumſtances of Terror.

Sect. 26. As to the firſt of theſe Particulars, it ſeems to be agreed,
at an Entry may be ſaid to be forcible, not only in Reſpect of a Vio-
ce actually done to the Perſon of a Man, as by beating him if he re-
e to relinquiſh his Poſſeſſion, but alſo in Reſpect of any other Kind of
lence in the Manner of the Entry, as by breaking open the Doors of H. P. C. 116.
Houſe, whether any Perſon be in it at the ſame Time or not, eſpecial- 2 Rol. Re. 2. Noy 136.
if it be a Dwelling-houſe, and perhaps alſo by any Act of Outrage af-
the Entry, as by carrying away the Party's Goods, *&c.* which being 30 Aſſ. 50.
nd in an Aſſiſe of Novel Diſſeiſin, will make the Defendant a Diſſei- 11 H. 4. 16. b. 17. a.
with Force, and ſubject him to Fine and Impriſonment: And accord- 2 Inſt. 235,
to ſome Opinions, an Entry may be ſaid to be forcible from the bare 236.
wing up of a Latch, or pulling back the Bolt of a Door; but ſure- Dal. ch. 77. Crom. 70. a. b.
ſuch inconſiderable Circumſtances as theſe, which commonly paſs be- Moore 656.
een Neighbour and Neighbour, without any Offence at all, can never Pl. 899.
ng a Man within the Meaning of theſe Statutes, which ſpeak of En- Noy 137.
es with ſtrong Hand, or Multitude of People; and it hath been holden, Dalt. ch. 77. H. P. C. 138.
hat an Entry into a Houſe through a Window, or by opening a Door Lamb. 143.
th a Key, is not forcible: And it is ſaid, That if one find a Man out 2 Rol. Re. 2.
his Houſe, and forcibly with-hold him from returning to it, and ſend Lamb. 143.
rſons to take peaceable Poſſeſſion thereof, in the Party's Abſence, yet he Dal. ch. 77.
not guilty of a forcible Entry, inaſmuch as he did no Violence to the
ouſe, but only to the Perſon of the other: But perhaps this Opinion
ay juſtly be queſtioned, becauſe though the Force be not actually done
on the Land, nor in the very Act of the Entry, yet ſince it is uſed with
immediate Intent to make ſuch Entry, and is the only Cauſe that it met
th no Oppoſition, ſurely it cannot be ſaid, that the Entry is without
rce, which whether it be upon, or off the Land, ſeems equally within
e Statute.

Sect. 27. As to the ſecond Particular, *viz.* In reſpect of what Cir-
mſtances of Terror an Entry may be adjudged forcible; it is to be ob-
rved, That where-ever a Man, either by his Behaviour or Speech, at H. P. C. 128.
e Time of his Entry, gives thoſe who are in Poſſeſſion of the Tene- Lamb. 142, &c.
ents which he claims, juſt Cauſe to fear, that he will do them ſome bodi- Dal. ca. 77.
Hurt, if they will not give way to him, his Entry is eſteemed forcible,
hether he cauſe ſuch a Terror, by carrying with him ſuch an unuſual

10 H. 7. 12. a. Crom. 69. Pl. 14, 24.

See the Books above cited.

Number of Servants, or by arming himſelf in ſuch a Manner, as plainly intimates a Deſign to back his Pretenſions by Force, or by actually threatening to kill, maim, or beat thoſe who ſhall continue in Poſſeſſion, or by giving out ſuch Speeches as plainly imply a Purpoſe of uſing Force againſt thoſe who ſhall make any Reſiſtance, as if one ſay that he will keep his Poſſeſſion in Spite of all Men, *&c.*

Bro. Dureſs, 12, 16. 1 Inſt. 253. b. Dal. ca. 77.

Sect. 28. But it ſeemeth that no Entry ſhall be judged forcible from any threatening to ſpoil another's Goods, or to deſtroy his Cattle, or to do him any other ſuch like Damage which is not perſonal.

Lamb. 143.

Sect. 29. However it is clear, That it may be committed by a ſingle Perſon, as well as by twenty.

H. P. C. 138.

Sect. 30. As to the third Point, *viz.* What Detainer is to be adjudged forcible, it ſeemeth certain, That the ſame Circumſtances of Violence or Terror, which will make an Entry forcible, will make a Detainer forcible alſo; from whence it ſeems to follow, That whoever keeps in his Houſe an unuſual Number of People, or unuſual Weapons, or threatens to do ſome bodily Hurt to the former Poſſeſſor, if he dare return, ſhall be adjudged guilty of a forcible Detainer, tho' no Attempt be made to re-enter; and it hath been ſaid, That he alſo ſhall come under the like Conſtruction, who places Men at a Diſtance from the Houſe, in order to aſſault any one who ſhall attempt to make an Entry into it; and that he alſo is in like Manner guilty who ſhuts his Doors againſt a Juſtice of Peace coming to view the Force, and obſtinately refuſes to let him come in. But it is ſaid, That a Man ought not to be adjudged guilty of this Offence for barely refuſing to go out of a Houſe, and continuing therein in deſpight of another.

Lamb. 145. Crom. 70. H. P. C. 139. Dal. ca. 77. Cro. Ja. 199. Crom. 70. b. Lamb. 145. Crom. 70. b. Lamb. 145. Crom. 73. Dal. ca. 77.

Sect. 31. As to the fourth Point, *viz.* In reſpect of what Kind of Poſſeſſions one may be guilty of a forcible Entry or Detainer within theſe Statutes it ſeems clear, That one may come within the Danger thereof by a Force done to Eccleſiaſtical Poſſeſſions, as [a] Churches, [b] Vicaridge-Houſes, *&c.* as much as if the ſame were done to any temporal Inheritance; although it hath been holden for a general Rule, That one may be indicted for a forcible Entry into any ſuch incorporeal Hereditament, for which a [c] Writ of Entry will lie, either by the Common Law, as for [d] Rent, or by Statute, as for [e] Tithes, *&c.* but I do not find any good Authority, That ſuch an Indictment will lie for a [f] Common or [g] Office; but it ſeems agreed, That an Indictment of forcible Detainer lies againſt any one, whether he be the Tertenant or a Stranger, who ſhall forcibly diſturb the lawful [h] Proprietor in the Enjoyment of any of the above-mentioned Poſſeſſions; as by violently reſiſting a Lord in his Diſtreſs for a Rent, or by menacing a Commoner with bodily Hurt, if he dare put in his Beaſts into the Common, *&c.* yet it ſeems clear, That no one can come within the Danger of theſe Statutes by a Violence offered to another in reſpect of a Way, or ſuch like Eaſement, which is no Poſſeſſion. Alſo it ſeemeth, That a Man cannot be convicted upon View, by Force of 15 *Ric.* 2. 2. of a forcible Detainer of any ſuch Tenement, wherein he cannot be ſaid to have made a precedent forcible Entry, becauſe that Statute gives the Juſtices a Juriſdiction of no other forcible Detainer, but what follows a forcible Entry.

[a] 1 Sid. 101. 1 Lev. 90. 1 Keb. 438. [b] Cro. Ja. 41. [c] Cro. Ca. 201. [d] 20 H. 6. 11. a. 22 H. 6. 33. a. Bro. Force, 7. Cro. Ca. 201. [e] Cro. Ca. 201. [f] See Cro. Ca. 486. See Dal. ca. 77. [g] Cro. Ja. 18. [h] Crom. 69, 70. Lamb. 144. Dal. ca. 77. 1 Mod. 73. 2 Keb. 709.

Vide infra Sect. 40.

Sect. 32. As to the fifth Point, *viz.* Who may be guilty of a forcible Entry or Detainer within theſe Statutes; it ſeems clear, That no one can come within the Intention thereof by any Force whatſoever done by him in entering into a Tenement, whereof he himſelf had the ſole and lawful Poſſeſſion, both at and before the Time of ſuch Entry; as by breaking

eaking open the Doors of his own Dwelling-houſe, or of a Caſtle, which his own Inheritance, but forcibly detained from him by one who claims e bare Cuſtody of it; or by forcibly entring into the Land in the Poſſeſon of his own Leſſee at Will. *Sed Quære.* Moore 786. Cro. Ja. 18. 2 Keb. 495.

Sect. 33. But it ſeems clear, That a Jointenant, or Tenant in Common, ay offend againſt the Purport of theſe Statutes, either by forcibly ejecting, forcibly holding out his Companion, for tho' the Entry of ſuch a Tenant lawful *per my & per tout*, ſo that he cannot in any Caſe be puniſhed in Action of Treſpaſs at the Common Law, yet the Lawfulneſs of his ntry no Way excuſes the Violence, or leſſens the Injury done to his Comnion, and conſequently an Indictment of forcible Entry into a Moiety of Manor, &c. is good. 8 Ed. 4. 9. a. 19. a. 10 H. 7. 27. a. Latch 224. Palm. 419.

Sect. 34. Alſo if a Man have been in Poſſeſſion of Land for never ſo ng a Time, by a defeaſible Title, and another who hath a Right of Enthereunto, make a Claim, and yet ſuch wrongful Poſſeſſor ſtill continue s Occupation with Force and Arms, he is puniſhable for a forcible Entry d Detainer againſt the Purport of theſe Statutes, becauſe all the Eſtate hereof he was ſeiſed before ſuch Claim, was wholly defeated by it, and s Continuance in Poſſeſſion afterwards amounted in the Judgment of Law a new Entry. Co. Lit. 256, 257. Crom. 69. b. Lamb. 160, 161. Dal. ch. 77.

Sect. 35. It is ſaid, That an Infant or Feme Covert may be guilty with- the Intention of theſe Statutes, in reſpect of ſuch actual Violence as ſhall done by them in Perſon, but not in reſpect of what ſhall be done by oers at their Command, becauſe all ſuch Commands of theirs are void: lſo it is ſaid, That a Feme Covert may be impriſoned for ſuch Offence, t that an Infant ought not, becauſe he ſhall not be ſubject to corporal uniſhment, by Force of the general Words of any Statute, wherein he is t expreſly named. Dal. ch. 77. Crom. 69. Co.Lit. 357. b. 1 H. H. P. C. 21. Bro. Impriſon. 43, 45, 75, 101.

As to the ſixth Point, *viz.* What ought to be the Form of a Record ounded upon theſe Statutes, it hath been reſolved,

Sect. 36. Firſt, That it is ſufficient in the Caption of ſuch an Indictent, to ſay, That it was taken before *A. B. & C. D. Juſticiariis ad pam Domini Regis conſervandam aſſignatis*, without ſhewing that they had uthority to hear and determine Felonies and Treſpaſſes, for the Statute enles all Juſtices of Peace, as ſuch, to take ſuch Indictments. Palm. 277. Cro. 633.

Sect. 37. Secondly, It hath alſo been reſolved, That the Tenement which the Force was committed, muſt be deſcribed with convenient ertainty, for otherwiſe the Defendant will neither know the ſpecial harge to which he is to make his Defence, neither will the Juſtices or heriff know how to reſtore the injured Party to his Poſſeſſion; and om hence it follows, That an Indictment of a forcible Entry into a Tenement (which may ſignify any Thing whatſoever, [b] wherein a lan may have an Eſtate of Freehold,) or into a Houſe [c] or Tenement, into two Cloſes of Meadow [d] or Paſture, or into a Rood [e] or Half a ood of Land, or into [f] certain Lands belonging to ſuch a Houſe, or in- ſuch a Houſe, without ſhewing in what [g] Town it lies, or into a [h] Teement with the Appurtenances called *Trupenny* in *D.* is not good. ut it hath been reſolved, That an Indictment for a forcible Entry *in Domum Manſionalem ſive Meſſuagium, &c.* is good, for theſe are Words quipollent: Alſo that ſuch an Indictment for an Entry into a [k] Cloſe, alled Serjeant *Hern*'s Cloſe, *&c.* without adding the Number of Acres, good, for here is as much Certainty as is required in an Ejectment; Dal. ch. 81.

[a] Dal. 15. 2 Rol. Re. 46. 2 Rol. Ab. 80. Pl. 6. 3 Leon. 102. [b] Co. Lit. 6. a. [c] 2 Rol. Ab. 40. Pl. 4, 5. 1 Rol. Re. 334. Cro. Ja. 633. Palm. 277. [d] 2 Rol. Ab. 81. Pl. 4. [e] 1 Bulſt. 201. [f] 2 Leon. 186. 3 Leon. 102.

ro. forcib. Ent. 23. [g] 2 Leon. 186. [h] 2 Rol. Ab. 80. Pl. 7. [i] Cro. Ja. 633. Palm. 277. [k] Cro. El. 458. Rol. Ab. 80. Pl. 8.

and

and it hath been adjudged, That ſuch Indictment may be void as to ſuch Part thereof only which is uncertain, and good for ſo much as is certain,
2 Leon. 186. 3 Leon. 102. and therefore, that an Indictment for a forcible Entry into a Houſe, and certain Acres of Land thereto belonging, may be quaſhed as to the Land, and ſtand good as to the Houſe.

Sect. 38. Thirdly, It hath been alſo reſolved, That an Indictment,
2 Keb. 495. 3 Bulſt. 71. 1 Ven. 23,25. on 5 or 15 *Rich.* 2. needs not ſhew who had the Freehold at the Time of the Force, becauſe thoſe Statutes ſeem equally to puniſh all Force of this Kind, without any Way regarding what Eſtate the Party had on whom it was made; yet it ſeems, That ſuch an Indictment ought to ſhew that ſuch Entry was made on the Poſſeſſion of ſome Perſon, who had ſome
2 Keb. 495. Salk. 260-2. Eſtate in the Tenements, either as a Freeholder or Leſſee for Years, &c. for otherwiſe it doth not appear, that ſuch Entry was made injurious to any one; but it is ſaid, That an Indictment on 8 *H.* 6. muſt ſhew, that
Hetley 73. Latch 109. 2 Keb. 477, 499. 1 Keb. 191. Cro. El. 754. Noy 131. 2 Rol. Re. 65. Palm. 426. 1 Sid. 102. Con. Yelv. 28. 1 Bulſt. 177. the Place wherein the Force was committed was the Freehold of the Party grieved at the Time of ſuch Force; and therefore, That it is not ſufficient to ſay that the Defendant with ſtrong Hand, *&c.* entered into ſuch a Houſe, *exiſtens liberum Tenementum J. S. &c.* without ſaying, *adtunc exiſtens liberum Tenementum J. S.* for otherwiſe it may be intended, that it was his Freehold at the Time of the Indictment only, and not at the Time of the Force; and according to the general Opinion, an Indictment on that Statute cannot warrant an Award of Reſtitution, unleſs it find that the Party was ſeized at the Time; yet it is ſaid, That the Want of ſuch an expreſs finding may be ſupplied by ſuch Words as neceſſarily imply, that the Party was ſeiſed at the Time of the Force; as where it
Contra 1 Ventr. 306. 3 Leon. 102. Allen 49. Palm. 277. Con. 2 Rol. A. 80. Pl. 9. 2 Keb. 477. Palm. 277. Cro. Ja. 633, 634. is expreſly laid that the Defendant diſſeiſed *J. S. &c.* which is impoſſible, unleſs he had been ſeiſed of the Freehold at the ſame Time; and it hath been ſaid, That it is ſufficient in ſuch an Indictment to ſay that the Party was *Poſſeſſionatus pro termino Vitæ*, without uſing the Word *Seiſitus*, *&c.* for the ſame Propriety of Expreſſion is not required in Indictments as Pleadings; *ſed Quære.* Alſo it is ſaid, That if it do appear either in ſuch an expreſs or implicit Manner, that the Party injured had the Freehold of the Land at the Time of the Force, it is not neceſſary to ſhew farther what Eſtate in particular he had therein, or by what Title he claims the ſame; for it is not the Title, but the Poſſeſſion, which is in Queſtion.
2 Rol. A. 80. Pl. 3. And upon the like Ground it hath been adjudged, That an Indictment on the ſaid Statute for entering on my Farmer, and forcibly expelling him, and diſſeiſing me, is good, without ſhewing what Eſtate ſuch Farmer had; for it is ſufficient to ſhew that he had the Poſſeſſion, and the Injury complained of is the forcible Diſſeiſin done to me, which, being the main Point of the Indictment, if it be ſufficiently ſet forth in Subſtance, the Indictment is good; yet in this very Caſe the Want of ſhewing that ſuch
Yelv. 165. Farmer was ouſted, would have been an incurable Fault; becauſe his Poſſeſſion being my Poſſeſſion, unleſs he were ouſted, I could not be diſ-
Far. 123. ſeiſed. Alſo it hath been holden, That as an Indictment on 8 *H.* 6. muſt ſhew that the Party who is put out of Poſſeſſion was ſeiſed of a Freehold, in order to bring him within the Purview of that Statute, ſo alſo an Indictment on 21 *Jac.* 1. 15. muſt ſhew, That the Party injured was poſſeſſed of ſuch an Eſtate as will bring him within the Proviſion of
1 Ventr. 306. 1 Sid. 102. 1 Mod. 73. 2 Keb. 709. Salk. 260. Far. 123. that Act; and upon this Ground it hath been reſolved, That ſuch an Indictment, ſetting forth in general, that the Party was poſſeſſed, or that he was poſſeſſed for a certain Term, without adding, that it was for Years, is not good; for in the firſt Caſe it may be intended, That he was poſſeſſed only by Virtue of a Leaſe at Will; and in the ſecond, That

hat he was poſſeſſed of a Term for Life, in neither of which Caſes he within the Benefit of 21 *Jac.* 1. 15. Yet it hath been ſaid, That the ſſeſſion of ſuch an Eſtate, as is within that Statute, is ſufficiently ſet th in the reciting Part of an Indictment, as thus, *Quod cum J. S.* was 1 Mod. 73. ſſeſſed for a certain Term of Years, and being ſo poſſeſſed, was by ſtrong nd, *&c.* put out of Poſſeſſion, *&c.* without any direct Allegation of h a Poſſeſſion.

Sect. 39. Fourthly, it hath been reſolved, That a Repugnancy in ſet- g forth the Offence in an Indictment upon any of theſe Statutes, is an urable Fault; and upon this Foundation it hath been adjudged, That Indictment on 8 *H.* 6. ſetting forth, that the Defandants *Pacificè in-* Aleyn 50. Show. 272. *verunt, &c. & eum adtunc & ibidem vi & armis diſſeiſiverunt*, or that 1 Vent. 108. *S.* was ſeized and poſſeſſed, is void; and it hath alſo been adjudged, Poph. 205. Raymond 69. at an Indictment on 21 *Jac.* 1. ſetting forth, That the Party injured 1 Keb. 423, s poſſeſſed of a Term for Years, or of a Copyhold Eſtate, and that the 428,435,472. fendants with ſtrong Hand, ouſted, and diſſeiſed him, is void, becauſe s abſurd and contradictory to ſet forth a Diſſeiſin of ſuch an Eſtate ereof it is impoſſible that any Man can be diſſeiſed; alſo it hath been den, That an Indictment on 8 *H.* 6. ſetting forth a Diſſeiſin of Land, *unc & adhuc exiſtens liberum Tenementum J. S.* is void for its Repugnan- 2 Ro. Re. 311. Show. 272. inaſmuch as it implies, That *J. S.* always continued in Poſſeſſion, 2 Bulſ. 121. ich, if it be true, makes it impoſſible that he could be diſſeiſed at all; 1 Sid. 102. ſome have ſaid that this ſeeming Repugnancy may be reconciled, by in- ding that the Diſſeiſee might re-enter after the Time of the Diſſeiſin, and ore the finding of the Indictment; however it ſeems clear, That if the ords *Adhuc extratenet* be added, ſuch a Repugnancy cannot be helped any Intendment; and that no Reſtitution can be awarded on ſuch an In- tment, whether thoſe Words *Adhuc extratenet* be in it or not, becauſe Party grieved appears by the Indictment it ſelf to have had the Freehold he Time of the finding thereof.

Sect. 40. Fifthly, It hath been reſolved, That an Indictment of a 2 Rol. A. 80. Pl. 10. cible Detainer, without ſhewing that the Defendant made an Entry in- the ſame Lands, is not good, becauſe the Statute doth not prohibit who hath always been in Poſſeſſion, to maintain the ſame with Force: d it ſeems clear, That a Conviction of a forcible Detainer upon View Palm. 195, Force of 15 *Rich.* 2. 2. cannot be good, unleſs it ſhew that the Defen- 196, 197. Cro. Ja. 19, t was alſo guilty of a forcible Entry, for the Words of that Statute 20, 32. , *That at all Times that ſuch forcible Entries are made, and Complaint there-* Cro. El. 915. *cometh to the Juſtices*, &c. *that the ſame Juſtices*, &c. *ſhall go*, &c. *and they find any that hold ſuch Place forcibly, after ſuch Entry made*, &c. by ich it is plain, That the Juſtices have no Juriſdiction by Force of this tute, but where the Entry, as well as Detainer, was forcible: Yet in B. R. Hill. *ighton*'s Caſe it was reſolved, That ſuch a forcible Entry is ſufficiently ſet 1708. th in the Complaint recited in ſuch a Conviction; and it is plain, That Statute could not intend that the forcible Entry ſhould be viewed, be- ſe it is to precede the Proceedings of the Juſtices; but perhaps it is the ter Opinion, That an Indictment upon 8 *H.* 6. ſetting forth an Entry and cible Detainer, without ſhewing whether the Entry were forcible or ceable, is good; for there is no *Medium* between a forcible and peace- e Entry, and an Entry not alledged to have been forcible, ſhall be in- ded to have been peaceable, or if not ſo, yet it ſeems to be no Way terial, whether it ſhall be taken to have been forcible or peaceable, cauſe in either Caſe it is equally within the Statute, the Words where- as to this Purpoſe are, *Where any doth make forcible Entry in Lands and*

Tenements, or other Poſſeſſions, or them hold forcibly; by which it appears,

2 Rol. Ab. 80. Pl. 11. That a forcible Detainer is a diſtinct Offence from that of a forcible Entry, and no Way depending on it; and my Lord Chief Juſtice *Holt* ſeemed to

Yelv. 99. Cro. Ja. 151. 1 Sid. 97, 99, 414. 2 Keb. 505. Vide infra, Sect. 59. B. 2. Ch. 25. S. 2. be of this Opinion in *Leighton*'s Caſe above mentioned. However it ſeems to be certain, That if a Bill both for a forcible Entry and forcible Detainer be preferred to a Grand Jury, and found *Ignoramus* as to the Entry with Force, and *Billa vera* as to the Detainer, it will not warrant an Award of Reſtitution, but is void, becauſe a Grand Jury cannot find a Bill true for Part, and falſe for Part, as a Petit Jury may.

Salk. 260. 2. Bro. Force. 13. Lamb. 153. Dal. ch. 81. *Sect.* 41. Sixthly, It hath been reſolved, That no Indictment can warrant an Award of Reſtitution, unleſs it find that the Wrong-doer both ouſted the Party grieved, and alſo continueth his Poſſeſſion at the Time of the finding of the Indictment; for it is a Repugnancy to award Reſtitution of Poſſeſſion to one who never was in Poſſeſſion, and it is vain to award it to one who doth not appear to have loſt it.

Cro. Ja. 41. *Sect.* 42. Seventhly, It hath been reſolved, That the Time and Place of the Diſſeiſin are ſufficiently ſet forth in an Indictment, alledging, That the Defendant *Tali die intravit, &c. & ipſum A. B. manu forti diſſeiſivit*, without adding the Words *Adtunc & Ibidem*; for inaſmuch as the Entry and Diſſeiſin are both of them of the ſame Nature, and the one of them naturally tends to cauſe the other, it is implied, that they both happened at the ſame Time; and the forcible Entry being the principal Offence within the Purview of theſe Statutes, and the Diſſeiſin being only added to ſhew that the Party grieved hath a Right to a Reſtitution, as to which the Day of the Diſſeiſin is no Way material, it ſeemeth to be over nice to require a preciſe Exactneſs in ſetting it forth; neither can it be to any Purpoſe to alledge that the Diſſeiſin was at the ſame Place with the Entry, ſince it appears from the Nature of the Thing, that it could not but be ſo; yet in an Indictment of Murder, it is perhaps a fatal Miſtake, not expreſly to ſhew the Day and Place of the Stroke, as well as of the Aſſault, becauſe theſe Offences are of different Kinds, the one being only a Treſpaſs, and the other a Felony, and may well be intended to have happened at different Times and Places, and the giving of the Stroke being the principal Offence, ought to be ſet forth with the moſt exact Certainty.

B. 2. ch. 23. S. 88. Dy. 68. Pl. 28.

[a] Noy 125. [b] Cro. Ja. 32. [c] Cro. El. 186. Con. Noy 120. *Sect.* 43. Eighthly, It hath been reſolved, That a Diſſeiſin is ſufficiently ſet forth, by alledging, That the Defendant entered, *&c.* into ſuch a Tenement and diſſeiſed the Party, without adding, either of the Words [a] *Illicitè*, or [b] *Expulit*, or [c] *Inde*, for the Word *Diſſeiſivit* implies as much.

Cro. El. 461. Latch 224. 2 Bulſ. 258. B. 2. Ch. 25. S. 92. Con. 1. Keb. 572. 2 Keb. 133, 135. 1 Vent. 265. *Sect.* 44. Ninthly, It hath been reſolved, That an Indictment which purſues the Words of the Statute in alledging an Entry, *&c.* to have been made *Manu forti*, needs not expreſly alſo to ſay, That it was made *Vi & armis*, becauſe that is implied; alſo it is ſaid, That as the Want of theſe Words will not vitiate an Indictment which purſues the Statute, ſo neither will the uſing of them make good an Indictment which does not purſue it; yet it hath been reſolved, That ſuch an Indictment may be good without mentioning any Complaint, tho' the Statute ſeems to require it; for it is ſaid, That thoſe Words in the Statute are put in *cauſâ abundanti*; and that if a Juſtice of Peace have by any Means whatſoever Notice of a forcible Entry or Detainer, he may and ought to proceed againſt the ſame according to the ſaid Statute, as being a Diſturbance of the publick Peace, the Preſervation whereof was the chief End of theſe Statutes.

7 Ed. 4. 18. a. Dal. 25.

Sect.

Sect. 45. As to the ſeventh Point, *viz.* Of what Kind of Poſſeſſions a Reſtitution is to be awarded; it ſeems that it ought only to be awarded for the Poſſeſſion of ſuch Tenements as are viſible and corporeal, for no one who hath a Right to ſuch as are inviſible and incorporeal, as Rents, Commons, *&c.* can be put out of Poſſeſſion thereof, but only at his own Election, by a Fiction of Law, in order to enable him to recover Damages againſt the Perſon who hath wrongfully diſturbed him in the Enjoyment of them; for ſuch Things being mere Creatures of the Law, and depending entirely upon the Conſtruction thereof, are always in the Poſſeſſion of thoſe whom the Law adjudges to have a Right to ſuch Poſſeſſion, and conſequently all the Remedy that can be deſired againſt a Force offered to a Man in reſpect of ſuch like Poſſeſſions, is to have the actual Force removed, and the Offenders puniſhed for the ſame, which may be done by Force of 15 *Rich.* 2. *&c.*

Dal. ch. 81. Lamb. 153. Co. Lit. 323.

Sect. 46. As to the eighth Point, *viz.* To whom ſuch Reſtitution ought to be made; it hath been holden, That it ſhall only be given to him who is found by the Indictment to have been put out of an actual Poſſeſſion, and conſequently that it ſhall not be awarded to one who was only ſeized in Law, as to an Heir upon whom a Stranger abateth upon the Death of the Anceſtor, before any actual Entry made by ſuch Heir; and from the ſame Ground it followeth, That it ſhall not be granted to an Heir upon an Indictment, finding a forcible Entry made upon his Anceſtor.

Dalt. ch. 83. Lamb. 153. Lamb. 154. Dal. ch. 83. Vide Cro. Ja. 199.

Sect. 47. It hath been holden by ſome, That if a Diſſeiſee re-enter peaceably upon the Diſſeiſor, and continue for ſome Time peaceably upon the Tenements in Diſpute, and afterwards detain them with Force, the Diſſeiſor ſhall not be reſtored upon an Indictment finding the ſaid Force, becauſe his Poſſeſſion was at firſt peaceably defeated, and at the Time of the Force, he had, in the Judgment of Law, no Poſſeſſion at all; but I cannot be perſuaded that this Opinion is agreeable to the Intention of the ſaid Statutes, the principal End whereof ſeems to be to oblige all Perſons to refer themſelves to the Courts of Juſtice, for the Deciſion of their Claims to the Poſſeſſion of Land, and to reſtrain them from diſturbing the publick Peace, by ſuch Endeavours to right themſelves; but if ſuch a Practice as this ſhould be allowed, it would be eaſy to evade the Effect thereof by refraining from Violence at firſt, and then forcing the Party to leave the Poſſeſſion of the Premiſſes after a ſhort Continuance thereon in Peace; neither do I ſee any Difference between ſuch a Continuance for the Space of three Days, and a Continuance for three Hours or Minutes, inaſmuch as the ſubſequent Force is in each Caſe equally within the Miſchief intended to be provided againſt by the Statutes; and ſeeing the Statutes of 8 *H.* 6. and 31 *El.* 11. have expreſly provided, That thoſe who have been in Poſſeſſion for three Years, ſhall not be put out of Poſſeſſion by an Indictment of forcible Entry or Detainer; it ſeems plainly to be implied, That no one ſhall have the like Advantage, in reſpect of a Poſſeſſion for a ſhorter Time.

Crom. 162. b. 163. a. b.

Sect. 48. It will be needleſs in this Place to ſhew of what Kind of Hereditaments, or of what Kind of Eſtate therein, the Party who is to be reſtored muſt be found to have been ſeized or poſſeſſed, becauſe this may ſufficiently appear by what hath been ſaid in the foregoing Part of this Chapter.

Sect. 49. As to the ninth Point, *viz.* By whom and in what Manner ſuch Reſtitution may be awarded and given, there is no doubt, but that the ſame Juſtice, before whom an Indictment of forcible Entry or De-

Dal. ca. 82. Dy. 187.

tainer ſhall be found, may grant an Award of Reſtitution to the Party; and it is ſaid, That he may execute the ſame either in his own proper Perſon, or make his Precept to the Sheriff to do it.

1 Sid. 156. 1 Keb. 88. 1 Vent. 308.

Sect. 50. But it ſeems clear, That neither Juſtices of Peace, nor any other Court whatſoever, have Authority to grant a Reſtitution upon a Conviction of any Force taken by them upon View, unleſs the ſame be found by an Indictment, according to the Direction of 8 *H.* 6. c. 9. or 21

Dy. 187. Pl. 6.

Ja. 1. c. 15. Alſo it ſeems to be agreed, That no other Juſtices of Peace, except thoſe before whom ſuch an Indictment ſhall be found, have any Power, either at Seſſions, or out of it, to make any Award of Reſtitution;

Dal. ca. 82. Lamb. 184.

and that no other Court whatſoever can perſonally reſtore the Party without a Precept to the Sheriff.

Kellew. 159. Daliſ. 25. 9 Co. 118. b. 11 Co. 65. a.

Sect. 51. Alſo it hath been reſolved, That Juſtices of Oyer and Terminer have no Power, either to inquire of a forcible Entry or Detainer, or to award Reſtitution on any ſuch Indictment; becauſe, when a new Power is created by Statute, and certain Juſtices are aſſigned to execute it, it cannot regularly be executed by any other; and inaſmuch as Juſtices of Oyer and Terminer have a Commiſſion entirely diſtinct from that of Juſtices of Peace, they ſhall not, from the general Words of their Commiſſion, *Ad inquirend' de omnibus tranſgr' & de omnibus aliis Articulis & Cauſis cont' formam quorumcunque Statutorum fact' ſive perpetrat'*, be conſtrued to have any ſuch Powers as are ſpecially limited to Juſtices of Peace; yet it hath been reſolved, That the Juſtices of the King's Bench may award Reſtitution upon an Indictment of forcible Entry or Detainer removed be-

Far. 138. 7 Ed. 4. 18. a. 4 H. 7. 18. b. Daliſ. 25. 9 Co. 118. b. 11 Co. 65. a. Dal. ch. 82.

fore them, becauſe the ſaid Juſtices having a ſupream and ſovereign Juriſdiction over all Matters of a criminal and publick Nature, have always been eſteemed to have Power in all Cauſes of this Nature, being brought Judicially before them, to give the Parties ſuch Remedies in Relation thereto, as they ſhall appear to have a Right to demand, either by Common Law or by Statute.

Lamb. 157. Dal. ch. 82.

Sect. 52. The Sheriff if need be, may raiſe the Power of the County to aſſiſt him in the Execution of a Precept of Reſtitution, and therefore, if he make a Return thereto, that he could not make a Reſtitution by Reaſon of Reſiſtance, he ſhall be amerced.

Salk. 260. Pl. 1. Carth. 496.

Sect. 53. As to the tenth Point, *viz.* How ſuch Reſtitution may be barred by the Continuance of a Poſſeſſion for three Years, it appears from the abovementioned Proviſo of 8 *H.* 6. and alſo by 31 *El.* 11. That any one indicted upon theſe Statutes, may alledge ſuch Poſſeſſion to ſtay the Award of Reſtitution; in the Conſtruction whereof it hath been holden,

Far. 138. Dalt. ca. 79. Crom. 71. H. P. C. 139. Dyer 141. Pl. 48. 22 H. 6. 18. b. Bro. Force, 22, 29. Crom. 71.

That ſuch Poſſeſſion muſt have continued without Interruption during three whole Years next before the Indictment; and therefore, That he who having been in Poſſeſſion of Land for three Years, or more, is forcibly ouſted, and then reſtored by Force of the Statute of 8 *H.* 6. cannot juſtify a forcible Detainer, till he have been in Poſſeſſion again for three Years after ſuch Reſtitution; and alſo for the ſame Reaſon it hath been ſaid, That he, who under a defeaſible Title hath been never ſo long in Poſſeſſion of Land to which another hath a Right of Entry, cannot juſtify ſuch a Detainer at any Time within three Years after a Claim made by him who hath ſuch a Right, becauſe all defeaſible Eſtates in the Land are wholly defeated by ſuch a Claim, and the ſubſequent Continuance in Poſſeſſion amounted to a new Entry.

Dal. ca. 79. 1 Inſt. 256. H. P. C. 139. Bro. Force, 22.

Dal. ca. 79. 22 H. 6. 18. b. Crom. 71.

Sect. 54. There have been ſome Opinions, That the three Years Poſſeſſion muſt be of a lawful Eſtate, and conſequently that a Diſſeiſor's Continuance in quiet Poſſeſſion for never ſo many Years, ſhall not juſtify

a forcible Detainer; but it ſeems neceſſary to make a Diſtinction between a Detainer againſt him who has a Right of Entry, and a Detainer againſt a Stranger, or one who by his Laches has loſt his Right of Entry; for I do not ſee why three Years Continuance of a defeaſible Poſſeſſion ſhould not juſtify a Detainer by Force againſt a Stranger, inaſmuch as he cannot take Advantage of another's Right, and bare Poſſeſſion is a good Title againſt all Perſons, except him who hath the Right, and cannot be lawfully defeated by any other. Alſo if one who has the mere Right to Lands, have ſo long neglected to recover the Poſſeſſion thereof, till in Judgment of Law he hath no more Right to ſuch Poſſeſſion, till he have recovered it by Action, than a mere Stranger, there doth not ſeem to be any Reaſon that he ſhould have more Advantage againſt a forcible Detainer, than if he were a meer Stranger.

Sect. 55. Alſo it hath been holden, That a peaceable Continuance in Poſſeſſion for three Years after a forcible Entry, under any Title whatſoever, will not juſtify a forcible Detainer, inaſmuch as the Poſſeſſion was at firſt gained by Force; but I cannot think this a reaſonable Conſtruction of the ſaid Statutes, for the Force in the Detainer being after three Years quiet Poſſeſſion, ſeems juſtifiable by the expreſs Words of the Statute; and where the Force uſed in gaining a Poſſeſſion is afterwards wholly laid aſide, there ſeems to be no Colour to ſay, That it makes the ſubſequent Poſſeſſion leſs quiet or peaceable than it would have been, if there had been no Force at all uſed at the firſt.

Sect. 56. It ſeems clear from the expreſs Purview of the ſaid Statute of 1 *El.* 11. that where-ever the Defendant pleadeth ſuch a Poſſeſſion in Bar of Reſtitution upon ſuch an Indictment, either before the Juſtices of Peace, or in the King's Bench, no Reſtitution ought to be awarded till the Truth of the Plea be tried; and it hath been holden, That the Plea of ſuch a Poſſeſſion is good, without ſhewing under what Title, or of what Eſtate ſuch Poſſeſſion was, becauſe it is not the Title, but the Poſſeſſion only, which is material in this Caſe.

1 Keb. 538. The King and Burges. Sal. 261. Pl. 1.

1 Sid. 149. 1 Keb. 538. Raymond 84. 1 Vent. 265.

Sect. 57. It ſeems that from the Wording of 31 *El.* 11. if one who has been in Poſſeſſion for three Years, be ouſted, and the ſame Day re-enter with Force, and alſo be indicted for ſuch Re-entry on the very ſame Day, it may be queſtioned whether the Proſecutor ought to have Reſtitution, inaſmuch as the Words of the Statute are, *That there ſhall be no Reſtitution, &c. if the Perſon indicted have been in quiet Poſſeſſion for three Years next before the Day of the Indictment found*; and here the Defendant hath been in Poſſeſſion three Years before the Day of the Indictment, though not three Years before the Indictment, inaſmuch as he was ouſted the ſame Day; but if it be conſidered, That the Circumſtance of finding the Indictment on that Day no way affects the Merits of the Cauſe, or leſſens the Offence any more than if it were found in any other Day; and that Reſtitution muſt have been awarded if it had been found on another Day; and that the Miſchief complained of in the Preamble is, that Perſons were by Colour of ſuch Indictments often turned out of their Poſſeſſions which they had quietly enjoyed for three Years next before ſuch Indictments found, which does not extend to the Defendant in the preſent Caſe, I rather incline to think, that Reſtitution might be awarded to the Proſecution in this Caſe, inaſmuch as it clearly appears, That the Defendant's Poſſeſſion hath not had three Years uninterrupted Continuance within the Intent of the Statute.

Sect. 58. As to the eleventh Point, *viz.* For what other Cauſes ſuch Reſtitution may be ſtay'd, it ſeemeth to be ſettled at this Day, That if the Defendant tender a Traverſe of the Force, which muſt be done in Writing, and not by a bare Denial of the Force by Parol, the Juſtice ought not to make any Reſtitution, till the Traverſe be tried; in order whereunto he muſt award a *Venire facias*, whereon a Jury muſt be returned, on whoſe Verdict the Award of Reſtitution ought to depend.

1 Keb. 343. 2 Keb. 49, 571. 1 Sid. 284. Salk. 587, 588.

Sect. 59. It hath been reſolved, That if ſuch a Jury find Part of the Indictment to be true, and Part of it to be falſe; yet if they find ſo much thereof to be true as will warrant a Reſtitution, the Juſtice ought to reſtore the Party; as where on an Indictment of Forcible Entry and Forcible Detainer, the Jury find that the Entry was peaceful, and the Detainer was only forcible.

1 Sid. 97, 99. 1 Keb. 427.

Sect. 60. As the Juſtice is bound to ſtay the Award of Reſtitution, upon the Defendant's tendering a Traverſe of the Force, ſo it hath alſo been ſaid, That he ought not to make ſuch an Award in any Caſe in the Defendant's Abſence, without calling him to anſwer for himſelf; for it is implied by natural Juſtice, in the Conſtruction of all Laws, That no one ought to ſuffer any Prejudice thereby, without having firſt an Opportunity of defending himſelf.

Savil 68. Pl. 141. Aleyn 78, 79.

Sect. 61. As to the twelfth Point, *viz.* How ſuch a Reſtitution may be ſuperſeded before it is executed, there is no Doubt but that the ſame Juſtices by whom a Reſtitution is awarded upon an Indictment of Forcible Entry or Detainer found before them, may alſo afterwards upon an Inſufficiency of the Indictment appearing unto them, ſuperſede the ſame before it is executed: And it hath alſo been ſaid, That if ſuch an Indictment be taken, and Reſtitution awarded by four or five Juſtices, that two or even one of the ſame Juſtices may ſuperſede the Execution thereof, as well as more or all of them. But it ſeems to be agreed, That no other Juſtices, or other Court whatſoever, have ſuch Power, except the King's Bench.

Dyer 187. Pl. 6. H. P. C. 140. Crom. 165. Dalt. cap. 81, 84. Cro. El. 915. Yelv. 32.

Sect. 62. However it is certain, that a *Certiorari* from the King's Bench is a *Superſedeas* to ſuch Reſtitution; for every ſuch *Certiorari* has theſe Words, *coram nobis terminari volumus & non alibi*, and conſequently it wholly cloſes the Hands of the Juſtices of the Peace, and avoids any Reſtitution which is executed after the *Teſte*, but does not bring the Juſtices of Peace, *&c.* into a Contempt, unleſs they proceed after the Delivering thereof.

Cro. El. 915. Yelv. 32. Moore 677. Pl. 921. 1 Keb. 93.

Sect. 63. As to the thirteenth Point, *viz.* How ſuch Reſtitution may be ſet aſide after it is executed; it is certain, That the Juſtices of the King's Bench, having a general ſuperintendent Power over all the Proceedings whatſoever of Juſtices of Peace, may ſet aſide any ſuch Reſtitution, if it ſhall appear to them to have been either awarded or executed againſt Law, as where the Indictment whereon it was grounded, being removed before them, appears to be Inſufficient, and thereupon is quaſhed; or the Defendant traverſes the Force and gets a Verdict in the King's Bench, or whenever it ſufficiently appears that the Juſtices of Peace have been irregular in their Proceedings, as by refuſing to try a Traverſe of Force tendered by the Defendant, *&c.*

Savil 68. Pl. 141. H. P. C. 140. 141. Cro. El. 31. Supra Sect. 58.

Sect. 64. Yet if an Indictment on theſe Statutes be removed into the King's Bench, and the Defendant having been turned out of Poſſeſſion by the Grant of Reſtitution to the Proſecutor by the Juſtices of Peace, traverſe the Force in the King's Bench, and then the Offence be pardoned by a general Pardon, the Court cannot proceed on the Trial, notwithſtanding

Noy 119. Yelv. 99. Cro. Ja. 148, 149.

ſtanding the Defendant would wave the Benefit of the Pardon, becauſe it appears judicially, That the King can have no Benefit of a Fine from the Defendant if the Verdict paſs againſt him; and the Court will never falſify an Indictment, which is found by the Oaths of twelve Men, by bare Affidavits; and conſequently in this Caſe the Defendant can have no Remedy to ſet aſide the Reſtitution by controverting the Truth of the Indictment. B. 2. Ch. 37. Sect. 61.

Sect. 65. Neither can a Defendant in any Caſe whatſoever, *ex Rigore Juris*, demand a Reſtitution, either upon the quaſhing of the Indictment, or a Verdict for him on a Traverſe thereof, *&c.* for the Power of granting Re-reſtitution is veſted in the King's Bench, only by an equitable Conſtruction of the general Words of the Statutes, and is not expreſly given by thoſe Statutes; and is never made uſe of by that Court, but when upon Conſideration of the whole Circumſtances of the Caſe, the Defendant ſhall appear to have ſome Right to the Tenements, the Poſſeſſion whereof he loſt by the Reſtitution granted to the Proſecutor. Raym. 85. 1 Keb. 343, 808. 2 Keb. 505. H. P. C. 141. Cro. El. 916. Salk. 587. Dyer 123. Pl. 34. 2 Keb. 571. Savil 68. Pl. 141.

Sect. 66. The Court of King's Bench hath been ſo favourable to one, who, upon his Traverſe of an Indictment upon theſe Statutes being found for him, hath appeared to have been unjuſtly put out of his Poſſeſſion, that they have awarded him a Re-reſtitution, notwithſtanding it hath been ſhewn to the Court, that ſince the Reſtitution granted upon the Indictment, a Stranger hath recovered the Poſſeſſion of the ſame Land in the Lord's Court. Cro. El. 41.

CHAP. LXV.

Of Riots, Routs, and unlawful Aſſemblies.

IN treating of Riots, Routs, and unlawful Aſſemblies, I ſhall conſider,

1. What ſhall be called a Riot, Rout, or unlawful Aſſembly.
2. How they may be ſuppreſſed and puniſhed by the Common Law.
3. How by Statute.

Sect. 1. And firſt a Riot ſeems to be a tumultuous Diſturbance of the Peace, by three Perſons, [a] or more, aſſembling together of their own Authority, with an Intent mutually to aſſiſt one another, againſt any who ſhall oppoſe them, in the Execution of ſome Enterprize of a private Nature, and afterwards actually executing the ſame in a violent and turbulent Manner, to the Terror of the People, whether the Act intended were of itſelf lawful or unlawful. [b]

[a] Vide 1 Vent. 251. Salk. 594, 595. Dalt. cap. 85, 86, 87. Cromp. 61, &c. Pult. 25, &c. 3 Inſt. 176. H. P. C. 137. 3 Mod. 141.

[b] But ſee Salk. 594. Pl. 4.

For the better Underſtanding whereof, I ſhall conſider the following Particulars:

1. How far ſuch an Aſſembly may become riotous through the Want of legal Authority expreſſed or implied, or be excuſable by Reaſon of ſuch Authority.

2. How

2. How far the Intention with which the Parties aſſemble together muſt be unlawful.
3. With what kind of Violence or Terror the intended Enterprize muſt be executed.
4. How far the Grievance intended to be redreſſed muſt be of a private Nature.
5. Whether the unlawful Execution of an Act in its own Nature lawful may not make an Aſſembly riotous.

Sect. 2. As to the firſt Point it ſeems, That where-ever more than three Perſons uſe Force and Violence, in the Execution of any Deſign whatever wherein the Law does not allow the Uſe of ſuch Force, all who are concerned therein are Rioters: But in ſome Caſes wherein the Law authorizes Force, it is not only lawful, but alſo commendable to make uſe of it; as for a [a] Sheriff or [b] Conſtable, or perhaps even for a private [c] Perſon, to aſſemble a competent Number of People in Order with Force to ſuppreſs Rebels, or Enemies, or Rioters, and afterwards with ſuch Force actually to ſuppreſs them; or for a Juſtice of Peace, who has a juſt Cauſe to fear a violent Reſiſtance to raiſe the *Poſſe*, in order to remove a Force in making an Entry into, or detaining of Lands. Alſo it ſeems to be the Duty of a [d] Sheriff, or other Miniſter of Juſtice, having the Execution of the King's Writs, and being reſiſted in endeavouring to execute the ſame, to raiſe ſuch a Power as may effectually enable them to over-power any ſuch Reſiſtance; yet it is ſaid not [e] to be lawful for them to raiſe a Force for the Execution of a civil Proceſs, unleſs they find a Reſiſtance; and it is certain, That they are highly puniſhable for uſing any needleſs Outrage, or Violence therein.

[a] 2 And. 67. Poph. 121.
[b] 3 H. 7. 10. b.
[c] Poph. 121. Moore 656.
[d] 2 Inſt. 193.
[e] 3 Inſt. 161. 2 Inſt. 193.
Hob. 62, 264.

Sect. 3. As to the ſecond Point, *viz.* How far the Intention with which ſuch Perſons aſſemble together muſt be unlawful; it ſeems agreed, That if a Number of Perſons being met together at a Fair, or Market, or Church-ale, or any other lawful and innocent Occaſion happen on a ſudden Quarrel to fall together by the Ears, they are not guilty of a Riot, but of a ſudden Affray only, of which none are guilty but thoſe who actually engage in it, becauſe the Deſign of their Meeting was innocent and lawful, and the ſubſequent Breach of the Peace, happened unexpectedly without any previous Intention concerning it; yet it is ſaid, That if Perſons, innocently aſſembled together, do afterwards upon a Diſpute happening to ariſe among them, form themſelves into Parties, with Promiſes of mutual Aſſiſtance, and then make an Affray, they are guilty of a Riot, becauſe upon their confederating together with an Intention to break the Peace, they may as properly be ſaid to be aſſembled together for that Purpoſe from the Time of ſuch Confederacy, as if their firſt coming together had been on ſuch a Deſign: However it ſeems clear, That if in an Aſſembly of Perſons met together on any lawful Occaſion whatſoever, a ſudden Propoſal ſhould be ſtarted of going together in a Body to pull down a Houſe or Incloſure, or to do any other Act of Violence to the Diſturbance of the Publick Peace, and ſuch Motion be agreed to, and executed accordingly, the Perſons concerned cannot but be Rioters, becauſe their Aſſociating themſelves together for ſuch a new Purpoſe, is no way extenuated by their having met at firſt upon another; alſo it ſeems to be certain, That if a Perſon ſeeing others actually engaged in a Riot, do join himſelf unto them and aſſiſt them therein, he is as much a Rioter as if he had at firſt aſſembled with them for the ſame Purpoſe, inaſmuch as he has no Pretence that he came innocently into the Company, but appears to have joined himſelf unto them, with an Intention

Lamb. 179, &c. Dalt. cap. 86. Crom. 61, 62. 6 Mod. 43. Skin. 118.
Salk. 595.

to ſecond them in the Execution of their unlawful Enterprize; and it would be endleſs, as well as ſuperfluous, to examine whether every particular Perſon engaged in a Riot, were in Truth one of the firſt Aſſembly, or actually had a previous Knowledge of the Deſign thereof. 6 Mod. 43.

Sect. 4. As to the third Point, *viz.* With what kind of Violence or Terror, the intended Enterprize muſt be executed, it hath been holden, That it ought to be accompanied with ſome Offer of Violence, either to the Perſon of a Man, or to his Poſſeſſions, as by beating him, or forcing him to quit the Poſſeſſion of his Lands or Goods, *&c.* And from hence it ſeems to follow, That Perſons riding together on the Road with unuſual Weapons, or otherwiſe aſſembling together in ſuch a Manner as is apt to raiſe a Terror in the People, without any Offer of Violence to any one in Reſpect either of his Perſon or Poſſeſſions, are not properly guilty of a Riot, but only of an unlawful Aſſembly. Dalt. cap. 85. Lamb. 175. 3 Inſt. 176.

Sect. 5. However it ſeems to be clearly agreed, That in every Riot there muſt be ſome ſuch Circumſtances, either of actual Force or Violence, or at leaſt of an apparent Tendency thereto, as are naturally apt to ſtrike a Terror into the People; as the Shew [a] of Armour, threatening ſpeeches, or turbulent Geſtures; for every ſuch Offence muſt be laid to be done *in Terrorem Populi:* And from hence it clearly follows, That Aſſemblies at Wakes or other Feſtival Times, or Meetings for exerciſe of common Sports or Diverſions, as Bull-baiting, Wreſtling, and ſuch like, are not riotous. And from the ſame Ground alſo it ſeems to follow, That it is poſſible for more than three Perſons to aſſemble together with an Intention to execute a wrongful Act, and alſo actually to perform their intended Enterprize, without being Rioters; as if a competent Number of People aſſembled together, in order to carry off a Piece of Timber to which one of the Company hath a pretended Right, and afterwards do carry it away without any threatning Words, or other Circumſtances of Terror. And from the ſame Ground it ſeems alſo to follow, That Perſons aſſembled together in a peaceful Manner to do a Thing prohibited by Statute, as to celebrate Maſs, *&c.* and afterwards peacefully performing the Thing intended, cannot be ſaid to be Rioters; for there ſeems to be no Reaſon why an Aſſembly ſhould become riotous barely for doing a Thing contrary to Statute, any more than for doing a Thing contrary to Common Law. [a] Lamb. 178. Dalt. cap. 87. 3 H. 7. 1. a. 6 Mod. 141. 2 Keb. 558. Con. 1 Rol. Rep. 109. [b] Lamb. 179. Pulton 25. 3 Keb. 578. Lamb. 178. Crom. 62. a. Quære. 6 Mod. 141. 2 Keb. 558. Con. 1 Mod. 13. 1 Vent. 369; 380.

Sect. 6. As to the fourth Point, *viz.* How far the Grievance intended to be redreſſed muſt be of a private Nature; it ſeems agreed, That the Injury or Grievance complained of, and intended to be revenged or remedied by ſuch an Aſſembly, muſt relate to ſome private Quarrel only; as the inclоſing of Lands in which the Inhabitants of a Town claim a Right of Common, or gaining the Poſſeſſion of Tenements, the Title whereof is in diſpute, or ſuch like Matters relating to the Intereſt or Diſputes of particular Perſons, and no way concerning the Publick; for where-ever the Intention of ſuch an Aſſembly is to redreſs publick Grievances, as to pull down all Incloſures in general, or to reform Religion, or to remove evil Counſellors from the King, *&c.* if they attempt with Force to execute ſuch their Intentions, they are in the Eye of the Law guilty of levying War againſt the King, and conſequently of High Treaſon, as appears from *Chap.* 17. *Sect.* 25.

Sect. 7. As to the fifth Point, *viz.* Whether the Execution of an Act in its own Nature lawful, may make an Aſſembly riotous, it hath been generally holden, That it is no way material whether the Act intended to be done by ſuch an Aſſembly, be of it ſelf lawful or unlawful; from Quære and Vide Salk. 594, 4. Crom. 64. b. 66. a. Dalt. cap. 87.

whence it follows, That if more than three Perſons aſſiſt a Man to make a Forcible Entry into Lands, to which one of them has a good Right of Entry, or if the like Number in a violent and tumultuous Manner join together in removing a Nuſance, or other Thing which may lawfully be done in a peaceful Manner, they are as properly Rioters, as if the Act intended to be done by them were never ſo unlawful; for the Law will not ſuffer Perſons to ſeek the Redreſs of their private Grievances, by ſuch dangerous Diſturbances of the Publick Peace: However the Juſtice of the Quarrel in which ſuch an Aſſembly doth engage, is certainly a great Mitigation of the Offence.

Sect. 8. A Rout ſeems to be, according to the general Opinion, a Diſturbance of the Peace by Perſons aſſembling together with an Intention to do a Thing, which if it be executed will make them Rioters, and actually making a Motion towards the Execution thereof: But by ſome Books, the Notion of a Rout is confined to ſuch Aſſemblies only, as are occaſioned by ſome Grievance common to all the Company; as the Incloſure of Land in which they all claim a Right of Common, *&c.* However inaſmuch as it generally agrees with a Riot as to all the reſt of the above mentioned Particulars, requiſite to conſtitute a Riot, which have been already fully explained, except only in this, That it may be a compleat Offence without the Execution of the intended Enterprize, it ſeems not to require any farther Explication.

Lamb. 175, 176. Cromp. 61. Dalt. cap. 85. Bro. Riots, 4, 5. Pulton 25.

Sect. 9. An unlawful Aſſembly, according to the common Opinion, is a Diſturbance of the Peace by Perſons barely aſſembling together, with an Intention to do a Thing, which if it were executed would make them Rioters, but neither actually executing it, nor making a Motion toward the Execution of it; but this ſeems to be much too narrow a Definition: for any Meeting whatſoever of great Numbers of People with ſuch Circumſtances of Terror, as cannot but endanger the Publick Peace, and raiſe Fears and Jealouſies among the King's Subjects, ſeems properly to be called an unlawful Aſſembly; as where great Numbers, complaining of a common Grievance, meet together, armed in a warlike Manner in order to conſult together concerning the moſt proper Means for the Recovery of their Intereſts; for no one can foreſee what may be the Event of ſuch an Aſſembly.

Crom. 61. a. Bro. Riots, 4. Pulton 25. a. Dalt. cap. 95. Hob. 92. Salk. 594, 595. 1 Vent. 369, 380.

Sect. 10. Alſo an Aſſembly of a Man's Friends for the Defence of his Perſon, againſt thoſe who threaten to beat him if he go to ſuch a Market, *&c.* is unlawful; for he who is in fear of ſuch Inſults, muſt provide for his Safety, by demanding the Surety of the Peace againſt the Perſons by whom he is threatened, and not make uſe of ſuch violent Methods, which cannot but be attended with the Danger of raiſing Tumults and Diſorders to the Diſturbance of the Publick Peace: Yet an Aſſembly of a Man's Friends in his own Houſe, for the Defence of the Poſſeſſion thereof, againſt thoſe who threaten to make an unlawful Entry thereinto, or for the Defence of his Perſon againſt thoſe who threaten to beat him therein, is indulged by Law; for a Man's Houſe is look'd upon as his Caſtle.

21 H. 7. 39. Lamb. 179, 180. H. P. C. 137. Cromp. 64. a. Bro. Riots, 1. 5 Co. 91. b.

Sect. 11. As to the ſecond Point, *viz.* How far Offences of this Nature may be ſuppreſſed and puniſhed by the Common Law; it ſeems clear That every Sheriff and Under-Sheriff, and alſo every other Peace Officer as Conſtables, *&c.* may and ought to do all that in them lies toward the ſuppreſſing of a Riot, and may command all other Perſons whatſoever to aſſiſt them therein; alſo it is certain, That any private Perſon may lawfully endeavour to appeaſe all ſuch Diſturbances, by ſtaying those whom he ſhall ſee engaged therein from executing their Purpoſe, and alſo

Poph. 121. 3 H. 7. 1. a. 10. b. Vide ſupra.

by ſtopping others whom he ſhall ſee coming to join them; for if private Perſons may do thus much, as it is moſt certain that they may, towards the ſuppreſſing of a common Affray, ſurely *à fortiori* they may do it towards the ſuppreſſing of a Riot: Alſo it hath been holden, That private Perſons may arm themſelves in order to ſuppreſs a Riot; from whence it ſeems clearly to follow, that they may alſo make uſe of Arms in the ſuppreſſing of it, if there be a Neceſſity for their ſo doing. However it ſeems to be extremely hazardous for private Perſons to proceed to theſe Extremities; and it ſeems no way ſafe for them to go ſo far in common Caſes, leaſt under the Pretence of keeping the Peace, they cauſe a more enormous Breach of it, and therefore ſuch violent Methods ſeem only proper againſt ſuch Riots as favour of Rebellion, for the ſuppreſſing whereof no Remedies can be too ſharp or ſevere. However it is enacted by 1 *Geor.* 1. c. 5. *That if more Perſons than twelve being unlawfully, riotouſly and tumultuouſly aſſembled, twelve or more of them, ſhall continue together, and not diſperſe themſelves within one Hour after Proclamation made in Purſuance of that Statute, that then every Peace Officer of the Place where ſuch Aſſembly ſhall be, and all Perſons who ſhall be commanded to be aſſiſting to ſuch Officer, may and ought to apprehended all ſuch Rioters, and carry them before ſome Juſtice of Peace; and that if any ſuch Rioter ſhall happen to be killed, maimed, or hurt by Reaſon of their reſiſting ſuch Officer,* &c. *the Officer ſhall be diſcharged,* &c. But the Statute being wholly in the Affirmative, cannot be thought to take away any Part of the Authority in the ſuppreſſing of a Riot, which was before that Time given either to Officers or private Perſons by the Common Law or by Statute.

Poph. 121. Kelynge 76.

Sect. 12. Generally Offences of this Nature are puniſhed at the Common Law, as Treſpaſſes, by Fine and Impriſonment only; yet ſometimes, where they have been very enormous, they have been puniſhed with the Pillory; and anciently, if they were undertaken in Contempt of the King's expreſs Prohibition of their Meeting, under Pain of Forfeiture of Lands, &c. they ſeem to have been puniſhable with ſuch Forfeiture.

Crom. 61. Dalt. cap. 46. Cro. ca. 507. 2 Rol. Ab. 208.

Sect. 13. It hath been holden, That the Perſons of whom a Corporation conſiſts being guilty of a Riot, are puniſhable in their Natural, but not in their Politick Capacity; for the Corporation it ſelf cannot be at Fault, becauſe it is inviſible, and exiſts only in Suppoſition of Law; but there are ſome Precedents by which it appears, that Corporations have been amerced, and their Liberties ſeized into the King's Hands, for ſuffering a dangerous Riot to happen within their Juriſdiction without uſing their Endeavours to ſuppreſs it.

21 Ed. 4. 13. b. 14. a. Dalt. cap. 88. Cro. Ca. 252. 2 H. H. P. C. 155.

Sect. 14. Women are puniſhable as Rioters, but Infants under the Age of Diſcretion are not.

As to the third Point, *viz.* How far Offences of this Nature may be ſuppreſſed and puniſhed by Statute; I ſhall conſider,

1. How far they may be ſuppreſſed and puniſhed by one Juſtice of Peace.
2. How far by two or more.

Sect. 15. As to the firſt of theſe Points, it is enacted by 34 *Ed.* 3. 1. *that Juſtices of Peace ſhall have Power to reſtrain Offenders, Rioters, and Barrators; and to purſue, arreſt, take and chaſtiſe them according to their Treſpaſs and Offence; and to cauſe them to be impriſoned, and duly puniſhed,* &c.

Sect. 16.

14 H. 7. 9. b. Crom. 62. a. 63. b. 65. a. Lamb. 181, &c.

Sect. 16. And this Statute has been liberally conſtrued for the Advancement of Juſtice; for it has been reſolved, That if a Juſtice of Peace find Perſons riotouſly aſſembled, he alone without ſtaying for his Companions hath not only Power to arreſt the Offenders, and bind them to their good Behaviour, or impriſon them if they do not offer good Bail, but that he may alſo authorize others to arreſt them by a bare Parol Command without other Warrant, and that by Force thereof the Perſons ſo commanded may purſue and arreſt the Offenders in his Abſence as well as Preſence. It is alſo ſaid, That if a Juſtice of Peace be ſick, and hear that Perſons are riotouſly aſſembled, he may ſend his Servants to arreſt them, and bring them before him; and that if he hear that Perſons are riotouſly together in a certain Place, and go thither and find none there, he may leave his Servants behind him with a Command to arreſt them, when they ſhall come. Alſo it is ſaid, That after a Riot is over, any one Juſtice of Peace may ſend his Warrant to arreſt any Perſon who was concerned in it, and alſo that he may ſend him to Gaol, till he ſhall find Sureties for his good Behaviour.

Dalt. cap. 46. Bro. Peace 7. Dalt. ca. 46. Pult. 28. Dalt. cap. 46. 14 H. 7. 9. b. Lamb. 181, &c. Cromp. 64. a. Kellw. 41. Cromp. 195. b. Dalt. ca. 46.

[a] Bro. Peace, 7. Kellw. 41. a. Lamb. 181, &c. Pult. 26. a. H. P. C. 137. Cromp. 61. b. 63. a. 65. Dalt. cap. 46. Con. Bro. Judges 10.

Sect. 17. But it ſeems to be agreed, That no one [a] Juſtice of Peace hath any Power by Force of this Statute, either to record a Riot upon his own View, or to take an Inquiſition thereof after it is over: Alſo if one Juſtice of Peace proceeding upon this Statute, ſhall arreſt an innocent Perſon as a Rioter, it ſeemeth that he is liable to an Action of Treſpaſs, and that the Party arreſted may juſtify the reſcuing of himſelf, becauſe no ſingle Juſtice of Peace is by this Statute made a Judge of the ſaid Offence. [b] But if a Riot ſhall be committed by Perſons armed in an unuſual Manner, contrary to the Statute of *Northampton*, and any one Juſtice of Peace acting *ex Officio*, in Purſuance of the ſaid Statute, ſeize the Armor and impriſon the Offender, and make a Record of the whole Matter, ſuch a Record cannot be traverſed, becauſe it is made by one acting in a judicial Capacity, as appears more at large in the Chapter of Affrays; and for the ſame Reaſon, if a Juſtice of Peace proceeding on the Statute of 15 *Rich.* 2. againſt Forcible Entries and Detainers, ſhall upon his own View record a Riot, which ſhall be committed in the Making of any ſuch Forcible Entry or Detainer, a Riot ſo recorded cannot be traverſed, as hath been ſhewn in the foregoing Chapter. Alſo if a Juſtice of Peace acting as a Judge, by Virtue of any Statute whatſoever, impowering him ſo to do, make a Record upon his View of a Riot committed in his Preſence, ſuch Record ſhall not be traverſed; for the Law gives ſuch an uncontroulable Credit to Matters of Record, made by any Judge of Record as ſuch, that it will never admit of an Averment againſt the Truth thereof.

[b] 8 Co. 121. a. Dalt. cap. 22. 8 Co. 121. a. Dalt. cap. 22. Crom. 65. a. Dalt. cap. 46. Lamb. 317. Vide infra Sect. 25.

Pult. 25. a. 26. a. Lamb. 314. Crom. 62. a. 3 H. 7. 10. b. 3 Inſt. 158. Vide ſupra. Pult. 25, 26. Lamb. 314.

Sect. 18. It hath been queſtioned, Whether a Juſtice of Peace be authorized by Virtue of the above mentioned Statute of 34 *Ed.* 3. 1. to raiſe the Power of the County to ſuppreſs a Riot; but it ſeemeth, That being made a Conſervator of the Peace, he hath by Implication of Law all ſuch Powers in Relation thereto, as are incident to the Office of Conſervator of the Peace by the Common Law; and conſequently, That he hath a Right of demanding the Aſſiſtance of others to enable him to preſerve the Peace in the ſame manner, as every Sheriff and Conſtable is impowered to demand ſuch Aſiſtance by the Common Law: However there ſeems to be no Reaſon to doubt, but that every Juſtice of Peace is authorized by 17 *Rich.* 2. 8. to raiſe the Power of the County to repress Riot; for by the ſaid Statute it is enacted, *That as ſoon as the Sheriffs, other the King's Miniſters*, (under which Words all Juſtices of Peace are clearly to be included,) *ſhall hear of a Riot, Rout, or other Aſſembly ag-*

be Peace, they with the Power of the County where ſuch Caſe ſhall happen, ſhall diſturb ſuch Malice with all their Power, and ſhall apprehend all ſuch Offenders, and put them in Priſon, until due Execution of the Law be made of them; and that the Lords and other liege People of the Realm ſhall attend with their whole Strength and Power, the Sheriffs and Miniſters aforeſaid.

Sect. 19. As to the ſecond Point, *viz.* How far Offences of this Nature may be ſuppreſſed and puniſhed by two or more Juſtices of Peace, it is enacted by 13 *H.* 4. 7. *That if any Riot, Aſſembly, or Rout of People againſt the Law, be made in Parties of the Realm, that the Juſtices of Peace, three or two of them at the leaſt, and the Sheriff or Under-Sheriff of the County where ſuch Riot, Aſſembly or Rout ſhall be made hereafter, ſhall come with the Power of the County (if need be) to arreſt them, and ſhall arreſt them; and the ſame Juſtices and Sheriff, or Under-Sheriff, ſhall have Power to record that which they ſhall find ſo done in their Preſence againſt the Law: And that by the Record of the ſame Juſtices and Sheriff, or Under-Sheriff, ſuch Treſpaſſers and Offenders ſhall be convict in the Manner and Form as is contained in the Statute of Forcible Entries.*

Sect. 20. In the Conſtruction of this Statute, compared with the above mentioned Statute of 17 *Rich.* 2. 8. and alſo with the Statute of 2 *H.* 5. 8. it hath been holden, That all Perſons whatſoever, and even Noblemen, and all others of what Condition or Degree ſoever they may be, except Women, Clergymen, Perſons decrepit, and Infants under the Age of fifteen Years, are bound under Pain of Fine and Impriſonment upon reaſonable Warning to attend the Juſtices and Sheriffs in the Execution of the ſaid State, and not only to arreſt the Rioters, but alſo to conduct them to Priſon. Pult. 29. a. Lamb. 315. Dalt. cap. 46. Cromp. 63. a. Lamb. 116.

Sect. 21. Alſo it hath been holden, That thoſe who attend the Juſtices in order to ſuppreſs a Riot, may take with them ſuch Weapons as ſhall be neceſſary to enable them effectually to do it, and that they may juſtify the Beating, Wounding, and even the Killing of ſuch Rioters as ſhall reſiſt or refuſe to ſurrender themſelves. Poph. 120, 121. Crom. 62. Dalt. cap. 46. Lamb. 316.

Sect. 22. It is ſaid, That the Juſtices of Peace are not only impowered by the ſaid Statute, to raiſe the Power of the County to aſſiſt them, in ſuppreſſing a Riot which ſhall happen within their own View or Hearing, but alſo, that they may ſafely do it upon a credible Information given them of a notorious Riot happening at a Diſtance, whether there were any ſuch Riot in Truth or not; for it may be dangerous for them to ſtay till they can get certain Information of the Fact: But they ſeem to be puniſhable for alarming the Country in this Manner, without ſome ſuch probable Ground of their Proceeding, as would induce a reaſonable Man to think it neceſſary and convenient. Lamb. 318, 319. Dalt. cap. 46. Pult. 29. Pult. 29. a. Lamb. 315. 316. Crom. 64. b. Dalt. cap. 46.

Sect. 23. It ſeems clear from the ſaid Statute, That if the Juſtices, *&c.* going towards the Place where they have heard that there is a Riot, ſhall meet Perſons coming from thence riotouſly arrayed, they may arreſt them for being aſſembled together in ſuch an unlawful Manner, and alſo make Record thereof, *&c.* for the Statute extends to all other unlawful Aſſemblies whatſoever as well as to Riots. Dalt. cap. 46. Lamb. 316. Cromp. 63. a.

Sect. 24. Alſo it ſeems clear, That after the Juſtices have had a View of a Riot, they may make a Record thereof, whether the Offenders be in Cuſtody at the ſame Time, or have eſcaped: And it is ſaid, That the Juſtices may lawfully, upon a freſh Purſuit, arreſt ſuch of the Offenders as ſhall have eſcaped, but that they cannot at another Time award any Proceſs on ſuch a Record, and therefore that they ought to bail it into the King's Bench, if any of the Offenders eſcape from a freſh Lamb. 318. Dalt. cap. 46. Pult. 29. a. b. 8 Co. 121.

Vide infra Sect. 29. Vide ſupra Sect. 15, 16.

Purſuit, and that Proceſs ſhall iſſue againſt them from thence: However there ſeems to be no Doubt, but that any of the ſame Juſtices who have recorded a Riot, or any other Juſtice of Peace, may at any Time by Virtue of the above mentioned Statute of 34 *Ed.* 3. 1. arreſt thoſe who have been notoriouſly guilty of a Riot, in order to compel them to find Sureties for their Good Behaviour.

Raym. 386. Cromp. 65. a. 63. a. Dalt. ca. 46.

Sect. 25. It ſeemeth to be certain, That the Record of a Riot expreſly mentioned to have happened within the View of the Juſtices by whom it is recorded, is a Conviction of ſo great Authority, that it can no way be traverſed, however little Ground in Truth there might be to affirm that any Riot at all was committed, or however innocent the Parties may be of the Fact recorded againſt them. And it is ſaid, That if one be bound by Recognizance to keep the Peace, and on a *Scire Facias* thereon ſuch a Record of a Riot be produced againſt him, he ſhall not only be concluded thereby from pleading the general Iſſue, but alſo from pleading any Matter of Juſtification whatſoever.

Pult. 29. a. b. Lamb. 316, 317.

Lamb. 317. Dal. ca. 130.

Sect. 26. However it ſeemeth clear, That if in ſuch a Record of a Riot it be contained, that the Party was guilty therein of a Felony, or Maim, or Reſcous, the Party ſhall be concluded thereby as to the Riot only, and not as to any of the other Matters, becauſe the Juſtices of Peace have by this Statute a judicial Authority over no other Offences except Riots, Routs, and unlawful Aſſemblies.

Sect. 27. And inaſmuch as ſuch a Record is a final Conviction of the Parties as to all ſuch Matters as are properly contained in it, it ought to be certain both as to the Time and Place of the Offence, and the Number of Perſons concerned therein, and the ſeveral Kinds of Weapons made uſe of by them, and all other Circumſtances of the Fact; for ſince the Parties are concluded from denying the Truth of ſuch a Record, and have no other Remedy to defend themſelves againſt it, but only by taking Advantage of the Inſufficiency of what is contained in it, they may juſtly demand the Benefit of excepting to it, if it do not expreſly ſhew, both that they are guilty within the Meaning of the Statute, and alſo how far they are guilty, and that the Juſtices have purſued the Power given them by the ſaid Statute; and from the ſame Ground it ſeems alſo to follow That ſuch a Record may be excepted againſt, if it do not appear to have been made by the Sheriff or Under-Sheriff in Concurrence with the Juſtices.

Lamb. 316. Dalt. ca. 46.

Lamb. 319. Raym. 386. Con. Dal. ca. 46.

Sect. 28. It is ſaid that the Offenders being under the Arreſt of the ſaid Juſtices, and alſo convicted by a Record of their Offence, ought immediately to be committed to Gaol by the ſame Juſtices, till they ſhall make Fine and Ranſom to the King, which can be aſſeſſed by no other Juſtices of Peace, except thoſe by whom the Record of the Offence was made; and by 2 *H.* 5. 8. ſuch Fine ought to be larger than it was wont to be before that Statute, for the Support of the Charges of the ſaid Juſtices, &c. whereof Payment ought to be made by the Sheriff, by Indenture thereof between him and them.

Lamb. 317. Dalt. ca. 46.

Sect. 29. It is farther enacted by the ſaid Statute of 13 *H.* 4. 7. that if it ſhall happen, *That ſuch Treſpaſſers and Offenders be departed before the coming of the ſaid Juſtices and Sheriff, and Under-Sheriff, that the ſame Juſtices, three, or two of them ſhall diligently inquire within a Month after ſuch Riot, Aſſembly, or Rout of People ſo made, and thereof ſhall hear and determine according to the Law of the Land.*

Sect. 30. Alſo it is farther enacted by 19 *H.* 7. 13. *That the Sheriff having a Precept directed to him to return a Jury in purſuance of* 13 H. 4. 7. *ſhall return twenty-four Perſons dwelling within the Shire where ſuch Riot, Rout, or unlawful Aſſembly ſhall be ſo committed and done, whereof every of them ſhall have Lands and Tenements within the ſame Shire, to the yearly Value of twenty Shillings of Charter-Land or Freehold, or twenty-ſix Shillings and eight Pence of Copyhold, or of both, over and above all Charges, for to enquire of the ſaid Riot, Rout or unlawful Aſſembly. And that he ſhall return upon every Perſon ſo by him impanelled, in Iſſues at the firſt Day twenty Shillings, and at the ſecond Day forty Shillings, if they appear not, and be ſworn to inquire of the Premiſſes at the firſt Day. And that the Sheriff for every Default,* &c. *ſhall forfeit twenty Pounds,* &c.

Sect. 31. It is not clearly ſettled, whether the Month, within which the Juſtices of Peace are confined to take their Inquiry by Force of theſe Statutes, muſt be reckoned according to the Computation of a Lunar, or of a Solar Month; however it ſeems to be agreed, That if the Juſtices give their Charge to the Jury, and it is ſaid, that if they do but award a Precept for the returning of the Jury, within a Lunar Month, they may take the Verdict afterwards, for the Cauſe being regularly attached in them within the Time preſcribed by the Statute, ſhall be proſecuted as all other Cauſes ought, with ſuch convenient Diſpatch as to the Judges thereof ſhall ſeem proper; and the Statute, by obliging the Juſtices to make ſo ſpeedy an Inquiry, meant not to hurry them in the Execution of it.

1 Sid. 186. 1 Keb. 695. Vide ſupra. Lamb. 322. Dalt. ca. 46. Pult. 29. 6 Mod. 141. Salk. 593.

Sect. 32. It is generally ſaid, That any Juſtices of the County may take ſuch an Inquiry, whether they dwell near the Place where the Riot happened, or at a Diſtance, or whether they went to view the Riot or not; for the Statute ought to be conſtrued as largely as the Words will bear, in Favour of the Juſtices Power in the ſuppreſſing of ſuch Riots; and therefore thoſe Words in the Statute, that the *ſame Juſtices*, &c. *ſhall inquire*, ought to be thus expounded, That the ſame Juſtices who were before impower'd to raiſe the *Poſſe*, *&c.* ſhall inquire; and it is clear, That any Juſtices in the County are within that Part of the Statute which gives that Power; neither is it any way reaſonable to conſtrue the laſt Clauſe of the ſaid Statute, whereby the Juſtices who dwell higheſt, are bound to execute the Statute under Pain of one hundred Pounds, in ſuch a Manner as to reſtrain the Juriſdiction of thoſe who by the foregoing Part of the ſaid Statute are authoriſed to execute it; for if ſuch an Expoſition ſhould prevail, the Negligence of the Juſtices who happen to dwell higheſt would make the Statute wholly ineffectual.

Lamb. 322, 327. Dal. ca. 46. Pult. 29. b. Cro. 62. b. 63. a. ſeems contrary. See Sect. 44.

Sect. 33. It ſeems clear from the Wording of the above mentioned Clauſe, that the Sheriff ought not to join with the Juſtices in taking of ſuch an Inquiry, as he ought to do in making a Record of a Riot upon View.

Lamb. 321. Raym. 386. Vide Salk. 593. Carth. 383, 384.

Sect. 34. Alſo it ſeems clear from theſe Words in the Statute of 13 H. 4. 7. *That the ſame Juſtices ſhall hear and determine*, &c. that they may award Proceſs under their own *Teſte*, againſt thoſe who ſhall be indicted before them of any of the Offences above mentioned, according to the Form of the ſaid Statute; and alſo that they may award the like Proceſs for the Trial of a Traverſe of ſuch an Inquiſition, and do all other Things in relation thereunto, which are of Courſe incident to all Courts of Record.

Lamb. 323, 328. Dalt. cap. 46, & cap. 132. Pult. 26. b. Crom. 67.

Sect. 35. But it hath been queſtioned, whether the Juſtices can ſafely diſmiſs the Offenders upon their paying ſuch a Fine as ſhall be impoſed upon

Dalt. ca. 46. Crom. 61. b.

upon them without ſome Judgment, for their Impriſonment as well as Fine, inaſmuch as the Statute of 2 *H.* 5. 8. is expreſs, That all Rioters attainted of great and heinous Riots ſhall have one whole Year's Impriſonment at the leaſt, without Bail, *&c.* and that Rioters attainted of Petit Riots, ſhall have Impriſonment, as beſt ſhall ſeem to the King or to his Council.

Crom. 63. a. Pult. 24. b. Dalt. ca. 46. See 1 Leon. 282.

Sect. 36. Formerly, if the Fine impoſed upon Rioters by Juſtices of Peace had been too favourable, it was a common Practice for the Court of Star-Chamber afterwards to impoſe ſuch other Fine as might, together with that which was aſſeſſed by the Juſtices of Peace, be proportionable to the Heinouſneſs of the Offence; and this was ſaid not to be a double Puniſhment for the ſame Offence, but only an Award of due Penalty at ſeveral Times.

Sect. 37. It is farther enacted by the ſaid Statute of 13 *H.* 4. 7. *That if the Truth cannot be found in the Manner as is aforeſaid, then within a Month then next following, the Juſtices, three, or two of them, and the Sheriff, or Under-Sheriff, ſhall certify before the King and his Council all the Deed and the Circumſtances thereof: Which Certificate ſhall be of like Force as the Preſentment of twelve Men; upon which Certificate the ſaid Treſpaſſers and Offenders ſhall be put to anſwer, and they which ſhall be found guilty, ſhall be puniſhed according to the Diſcretion of the King and his Council. And if ſuch Treſpaſſers and Offenders do traverſe the Matter ſo certified, the ſame Certificate and Traverſe ſhall be ſent into the King's Bench, there to be tried and determined, as the Law requireth; and if they appear not before the King and his Council, or in the King's Bench, upon ſuch Proceſs and Proclamation for their Appearance as are required by the ſaid Statute, they ſhall be attainted of the Riot,* &c.

Sect. 38. And it is farther Enacted by 19 *H.* 7. 13. *That if a Riot,* &c. *be not found by the Jury by reaſon of any Maintenance or Embracery of the Jurors, then the ſame Juſtices,* &c. *over and above ſuch Certificate which they muſt and are bound to make by the ſaid Statute of* 13 *H.* 4. 7. *ſhall in the ſame Certificate certify the Names and Miſdemeanours of ſuch Maintainers,* &c. *on Pain that every of the ſaid Juſtices,* &c. *ſhall forfeit twenty Pounds, if they have no reaſonable Excuſe for not certifying the ſame; which Certificate ſo made, ſhall be of like Force as if the Matter were found by Verdict of twelve Men; and every Perſon duly proved to be ſuch a Maintainer,* &c. *ſhall forfeit twenty Pounds,* &c.

Lamb. 323, 326. Pult. 29. b. Dalt. ca. 46.

Sect. 39. In the Conſtruction of theſe Statutes it hath been holden, That the Certificate required by the above mentioned Statutes may be made, either by the Juſtices, *&c.* who went to ſee the Riot, or by thoſe who took the Inquiry; but it ſeems to be moſt proper, That where-ever ſuch an Inquiſition is taken, ſuch Certificate ſhould be made by ſuch Juſtices who made the Inquiry, becauſe they having had the Examination of the Fact, muſt needs be beſt able to judge of the Circumſtances thereof, and in that Reſpect are the moſt proper Perſons to ſupply the Defects of the Inquiry: However the ſaid Statute of 19 *H.* 7. 13. which is grafted on 13 *H.* 4. 7. ſeems clearly to imply, That ſome Juſtices are bound in a more eſpecial Manner to make ſuch Certificate than any others, by impoſing the Penalty of twenty Pounds on thoſe who neglect to make it as they are bound by 13 *H.* 4. 7. which Part of the Statute ſeems to be moſt reaſonably applied to thoſe Juſtices who took the Inquiry, or in Caſe that no Inquiry was taken, to thoſe Juſtices who endeavoured to take one, but by the Fault of others were hindered from taking it; for there was no Need of ſuch an additional Penalty on the neighbouring Juſtices who were bound before to do their Duty in executing 13 *H.* 4. 7. under

nder Pain of forfeiting one hundred Pounds, as will be ſhewn Sec-
ion 44, *&c.*

Sect. 40. Alſo it is generally ſaid, That ſuch a Certificate muſt be made within a Month after the Inquiry; and this ſeems to be a very eaſonable Conſtruction where an Inquiry has actually been made; but it may appen that no Inquiry at all may be taken, either through the Default of he Sheriff in not returning a Jury, or the Obſtinacy of the Jurors in re-uſing to appear, or the rebellious Humour of the People in not ſuffering he Juſtices to do their Duty; in all which Caſes a Certificate ſeems to be equired, both by the Intent and Letter of the Statute, the Words whereof s to this Purpoſe are, *If the Truth cannot be found in the Manner as is afore-aid, then within a Month then next following, the Juſtices*, &c. *ſhall cer-ify*, &c. And therefore in theſe Caſes it ſeems proper to make a Certificate f the Obſtructions, which prevented the Taking of ſuch an Inquiry, within Month after they happen. Pult. 29 b. Lamb. 324. Dalt. cap. 46.

Sect. 41. It ſeemeth clear from the plain Words of the Statute, That he Certificate ought to be made to the Privy Council-board, which is clearly iſtinguiſhed, both from the Chancery, and alſo from the King's Bench, hich, in ſome Statutes relating to judicial Proceedings, are taken for the ing's Council. Lamb. 324. Con. Crompt. 63. b. Dalt ca. 46, & 130. Bro. Præm. 1.

Sect. 42. It is ſaid, That if there be a Variance between the Inquiſition nd Certificate, that ſhall be taken which is moſt for the King's Advan-ge; and therefore if the Inquiſition be of a Riot by ten Perſons, and the ertificate of a Riot by twenty, or by ten in Harneſs; or of a Battery in'd with the Riot, that the Certificate ſhall be preferred, becauſe the Fine the King ſhall be the greater; but if they differ only as to the Time, it ſaid that the Inquiſition ſhall be preferred. Pul. 29. b. Cro. 63. b. Lamb. 325. Dal. ca. 46. Lamb. 326. Pul. 29. b.

Sect. 43. Alſo it ſeemeth certain, That ſuch a Certificate, being in Na-re of an Indictment at Common Law, ought to comprehend the Cer-inty of Time, Place, and Perſons, and other material Circumſtances, oth of the Riots and Maintenance, *&c.* but perhaps it needs not expreſs e Additions of the Offenders. Dal. ca. 46, & ca. 130. Lam. 321, 322.

Sect. 44. It is farther enacted by the ſaid Statute of 13 *H.* 4. 7. *That e Juſtices of Peace dwelling nigheſt in every County where ſuch Riot, Aſ-mbly, or Rout of People ſhall be made hereafter, together with the Sheriff or nder-Sheriff of the ſame County, and alſo the Juſtices of Aſſizes, for the ime that they ſhall be there in their Seſſion, in caſe that any ſuch Riot, Aſ-mbly, or Rout be made in their Preſence, ſhall do Execution of this Statute, ery one upon Pain of one hundred Pounds, to be paid to the King as often as ey ſhall be found in default of the Execution of the ſame Statute.*

In the Conſtruction of this Clauſe the following Opinions have been olden,

Sect. 45. I. That no Juſtice of Peace is in danger of incurring the enalty thereof, unleſs he dwell in the County wherein a Riot hap-ens. Lamb. 236. Crom. 63. b. Dal. ca. 46.

Sect. 46. II. That if any Juſtices of Peace, who do not dwell neareſt o the Place, do actually execute the Statute, they excuſe all the reſt. Dal. ca. 46. Lamb. 326.

Sect. 47. III. That if the Juſtices whoſe Dwelling was neareſt at the ime of the Riot, or one of them, happen to die within the Month, thoſe hoſe Dwelling is thereby become the neareſt are bound to execute the tatute in the ſame Manner as the others were. Crom. 63. b. Pult. 30. a. Crom. 62. b.

Lamb. 327. Dal. ca. 46. Pult. 30. a.

Sect. 48. IV. That notwithſtanding thoſe Juſtices only, who dwell neareſt, are liable to the Penalty of the Statute, yet if any others on Notice neglect to ſupply their Default, they are fineable at Diſcretion.

Crom. 63. b. Lamb. 327. Dal. ca. 46. Pult. 30. a.

Sect. 49. V. That if the two Juſtices, or one of them, do their Duty in executing, or endeavouring to execute the Statute, they ſhall not incur any Penalty thro' a Default of the Sheriff, *&c.* either in refuſing to appear, or to return a Jury, *&c.*

Sect. 50. VI. That the ſaid Juſtices, *&c.* ſhall not avoid the Penalty Crom. 61. b. by executing the Statute in Part only, as by recording a Riot without committing the Parties.

Sect. 51. VII. That no Juſtice, *&c.* is ſubject to the Penalty of the Dal. ca. 46. ſaid Statute on account of a Petit Riot, but only of ſuch as are notorious, and in nature of Inſurrections and Rebellions.

Dy. 210. Pl. 25. Lamb. 328. Pult. 28. b. Crom. 62 b. Dal. ca. 46.

Sect. 52. VIII. That if a Juſtice of Peace, *&c.* had no expreſs Notice given him of the Riot, he ſhall be excuſed, unleſs it were ſo very flagrant, that by common Intendment, every one dwelling near it could not but have Notice thereof.

Crom. 62. b. Lamb. 322. Pult. 28. Dalt. ca. 46. Crom. 64. a.

Sect. 53. IX. That the Acquieſcence or Agreement of the Parties aggrieved is no Excuſe to the Juſtices, becauſe they ought, *ex Officio*, to make the Inquiry, and make Proclamation whether any will give Evidence for the King, *&c.* and may bind ſuch of the Parties grieved as ſhall refuſe to proſecute their Complaint to their Good Behaviour.

Sect. 54. Alſo it is farther enacted by 2 *H.* 5. 8. *That upon any Default of the ſaid Juſtices,* &c. *touching the Execution of* 13 H. 4. *a Commiſſion ſhall be awarded at the Inſtance of the Party grieved, to enquire as well of the Truth of the Caſe, as of the Default of the ſaid Juſtices,* &c. *and that the ſaid Commiſſioners ſhall preſently return into Chancery the Inqueſts before them taken; and that the Jurors, who ſhall make Inquiry, ſhall be worth* 10l. per Annum, *and ſhall be returned by the Coroners, if the Sheriff, ſuppoſed to be in Default, continue in his Office,* &c. *See the Statute.*

Sect. 55. Alſo it is farther enacted by 2 *H.* 5. 9. and 8 *H.* 6. 14. *That the Lord Chancellor, upon Complaint made to him, that a dangerous Rioter is fled into Places unknown, and alſo upon a Suggeſtion under the Seals of two Juſtices of Peace and the Sheriff, that the common Fame and Voice runneth in the County of the Riot, may award a* Capias *againſt the Party returnable in Chancery upon a certain Day,* &c. *and afterwards a Writ of Proclamation returnable in the King's Bench,* &c.

Sect. 56. But all the Penalties of the above mentioned Statutes having been found by Experience not to be ſufficient to reſtrain the Rage of the Populace from breaking out into dangerous Tumults, whenever they happen to be perſwaded that they lie under any real or pretended Grievance, it was thought neceſſary to make a farther Proviſion againſt ſuch inſolent Diſturbances of the Peace, by more ſevere Laws; and to this End it was enacted by 1 *Geor.* 1. *c.* 5. *That if any Perſons to the Number of twelve, or more, being unlawfully, riotouſly, and tumultuouſly aſſembled together, to the Diſturbance of the publick Peace, and being required or commanded by any Juſtice of Peace, Sheriff of the County, or Under-Sheriff, or by the Mayor, Bailiff or Bailiffs, or other Head-Officer or Juſtice of the Peace of any City, or Town corporate, where ſuch Aſſembly ſhall be, by Proclamation to be made in the King's Name, immediately to diſperſe themſelves, and peaceably to depart to their Habitations, or to their lawful Buſineſs, under the Pains of the ſaid Statute, ſhall afterwards unlawfully, riotouſly, and tumultuouſly continue together by the Space of one Hour after ſuch Proclamation made, or after a wilful Let or Hindrance of a Juſtice*

ſtice of Peace, &c. from making the ſaid Proclamation, ſhall be adjudged Felons without Benefit of Clergy.

Sect. 57. And it is farther enacted by the ſaid Statute, *That if any Perſon or Perſons ſhall with Force and Arms wilfully and knowingly oppoſe, obſtruct, or in any Manner wilfully and knowingly, let, hinder, or hurt any Perſon, &c. who ſhall begin to proclaim, or go to proclaim, according to the Proclamation appointed by the ſaid Statute, whereby ſuch Proclamation ſhall not be made, they ſhall be adjudged Felons without Benefit of Clergy.*

Sect. 58. And it is farther enacted by the ſaid Statute, *That if any Perſons unlawfully, riotouſly, and tumultuouſly aſſembled together, to the Diſturbance of the Publick Peace, ſhall unlawfully and with Force demoliſh or pull down, or begin to demoliſh or pull down, any Church or Chapel, or any Building for religious Worſhip, certified and regiſtered according to* 1 Will. & Mar. 18. *which is commonly called* The Toleration Act, *or any Dwelling-houſe, Barn, Stable, or other Out-houſe, they ſhall be adjudged Felons without Benefit of Clergy.*

Sect. 59. And it is farther enacted by the ſaid Statute, *That when-ever any ſuch Church, &c. ſhall be demoliſhed, &c. by any ſuch Rioters, &c. the Inhabitants of the Town or Hundred wherein the Riot happened, ſhall be bound to make good the Damage, &c.*

CHAP. LXVI.

Of Offences by Officers in general.

OFFENCES under the Degree of capital, more immediately againſt the Subject, not amounting to an actual Diſturbance of the Peace, are either;

1. Such as are committed by Officers; or,
2. Such as are committed by common Perſons without any Relation to an Office.

Offences by Officers ſeem reducible to the following Heads:

1. Neglect, or Breach of Duty.
2. Bribery.
3. Extortion.

Sect. 1. As to the firſt of theſe Offences, I take it to be agreed, That in the Grant of every Office whatſoever, there is this Condition implied by common Reaſon, that the Grantee ought to execute it diligently and faithfully: For ſince every Office is inſtituted, not for the Sake of the Officer, but for the good of ſome other, nothing can be more juſt, than that he, who either neglects or refuſes to anſwer the End for which his Office was ordained, ſhould give way to others who are both able and willing to take Care of it. And therefore it is certain, That an Officer is liable to a Forfeiture of his Office, not only for doing a Thing directly contrary to the Deſign of it, but alſo for neglecting to attend his Duty Co Lit. 233, 234.

Duty at all uſual, proper, and convenient Times and Places, whereby any Damage ſhall accrue to thoſe, by or for whom he was made an Officer. And ſome have gone ſo far as to hold, That an Office concerning the Adminiſtration of Juſtice, or the Common Wealth, ſhall be forfeited for a bare Non-Uſer, whether any ſpecial Damage be occaſioned thereby or not: But this Opinion doth not appear to be warranted by any Reſolution in Point, and the [a] Authorities which are cited to maintain it, do not ſeem to come up to it: However it cannot but be very reaſonable, That he who ſo far neglects a publick Office, as plainly to appear to take no manner of Care of it, ſhould rather be immediately diſplaced, than the publick be in danger of ſuffering that Damage, which cannot but be expected ſome Time or other from his Negligence.

9 Co. 50. Co. Lit. 233.

[a] 39 H. 6. 32. 20 Ed. 4. 5. b. 22 Aſſ. 34. 2 H. 7. 11. b. Plow. Com. 379. Long Quinto Ed. 4. 27. 11 Ed. 4. 1.

Sect. 2. But it would be endleſs to enumerate all the particular Inſtances, wherein an Officer may be diſcharged or fined; and it alſo ſeems needleſs to endeavour it, becauſe they are generally ſo obvious to common Senſe, as to need no Explication; for what can be more plain, than that a Gaoler deſerves to be diſcharged and fined, for voluntarily [b] ſuffering his Priſoners to eſcape, or for [c] barbarouſly miſuſing them? What can be more evident, than that a [d] Sheriff is juſtly puniſhable for perſwading a Jury to underprize Goods in the Execution of a *Fieri Facias*, &c. And therefore I ſhall leave the particular Caſes of this Nature to every Man's own Judgment, which, from the Conſideration of the general Rules above mentioned, and the various Circumſtances of every Caſe, will eaſily diſcern how far each Offence of this Kind deſerves to be puniſhed.

[b] 9 Co. 50. a.
[c] Raym. 216.
[d] Cro. Ja. 42. b.

CHAP. LXVII.

Of Bribery.

IN treating of Bribery, I ſhall conſider,

1. What it is.
2. How it is puniſhable.

3 Inſt. 145.

Sect. 1. And firſt, Bribery in a ſtrict Senſe is taken for a great Miſpriſion of one in a judicial Place, taking any valuable Thing whatſoever, except Meat and Drink of ſmall Value, of any one who has to do before him any way, for doing his Office, or by Colour of his Office, but of the King only.

3 Inſt. 149. Hob. 9. Cro. Ja. 65.

Sect. 2. But Bribery in a large Senſe is ſometimes taken for the receiving or offering of any undue Reward, by or to any Perſon whatſoever, whoſe ordinary Profeſſion or Buſineſs relates to the Adminiſtration of publick Juſtice, in order to incline him to do a Thing againſt the known Rules of Honeſty and Integrity; for the Law abhors any the leaſt Tendency to Corruption in thoſe who are any way concerned in its Adminiſtration, and will not endure their taking a Reward for the doing a Thing which deſerves the ſevereſt of Puniſhments.

3 Inſt. 148.

Sect. 3. Alſo Bribery ſometimes ſignifies the taking or giving of Reward for Offices of a publick Nature; and ſurely nothing can be more

pably prejudicial to the Good of the Publick, than to have Places of the heſt Concernment, on the due Execution whereof the Happineſs of both ng and People doth depend, diſpoſed of not to thoſe who are moſt able to cute them, but to thoſe who are moſt able to pay for them; nor can any ng be a greater Diſcouragement to Induſtry and Virtue, than to ſee thoſe ces of Truſt and Honour, which ought to be the Rewards of thoſe who their Induſtry and Diligence have qualified themſelves for them, conferred ſuch who have no other Recommendation but that of being the higheſt Bid- Vide Noy
s; neither can any thing be a greater Temptation to Officers to abuſe their 102.
wer by Bribery and Extortion, and other Acts of Injuſtice, than the Con- Moore 781.
eration of the great Expence they were at in gaining their Places, and the ceſſity of ſometimes ſtraining a Point to make their Bargain anſwer their pectation; for which Reaſons, among many others, it is expreſly enacted 12 *Rich.* 2. 2. *That the Chancellor, Treaſurer, Keeper of the Privy Seal, ward of the King's Houſe, the King's Chamberlain, Clerk of the Rolls, the ſtices of the one Bench and of the other, Barons of the Exchequer, and all er, that ſhall be called to ordain, name, or make Juſtices of the Peace, She- ſs, Eſcheators, Cuſtomers, Comptrollers, or any other Officer or Miniſter of King, ſhall be firmly ſworn that they ſhall not ordain, name, or make, any the above mentioned Officers, for any Gift or Brocage, Favour or Affection, that none which ſueth by himſelf, or by others, privily, or openly, to be in any anner of Office, ſhall be put in the ſame Office, or in any other, but that they ke all ſuch Officers and Miniſters of the beſt and moſt lawful Men, and ſuf- ient to their Eſtimation and Knowledge.* Alſo it is farther enacted by 4 *H.* 4. *That no Sheriff ſhall let his Bailiwick to Farm to any Man, for the Time* Vide Noy
t he occupieth ſuch Office, &c. Alſo it is enacted by 5 & 6 *Ed.* 6. 16. *That if* 102.
y Perſon ſhall bargain or ſell, or take any Reward, or Promiſe of any Re- Moore 781.
ard for any Office, or the Deputation of any Office, any way concerning the ing's Revenue, or the Keeping of his Caſtles, or the Adminiſtration or Execu- n of Juſtice, (unleſs it be ſuch an Office as had been uſually granted before the aking of the ſaid Act by the Juſtices of the King's Bench, or common Pleas, by Juſtices of Aſſize) that then every ſuch Perſon ſo bargaining or lling, or taking ſuch Reward, or Promiſe, &c. *ſhall not only forfeit his Right ſuch Office, or to the Nomination thereof, but alſo every Perſon who ſhall ve any ſuch Reward or Promiſe,* &c. *ſhall be adjudged a diſabled Perſon in aw, to have or enjoy ſuch Office,* &c.

In the Conſtruction of this Statute of 5 & 6 *Ed.* 6. the following Points ve been reſolved;

Sect. 4. I. That the Offices of Chancellor, Regiſter, and Commiſſary in Cro. Ja. 269.
ccleſiaſtical Courts, are within the Meaning of the Statute, inaſmuch as 3 Inſt. 148.
oſe Courts do not only determine Matters which are brought before them, Salk. 468.
erely *pro ſalute Animæ*, but alſo have the Deciſion of Diſputes concerning 2 Lev. 289.
e Lawfulneſs of Matrimony and Ligitimation of Children, which touch 4 Vent. 187, 467.
e Inheritance of the Subjects, and alſo hold Plea of Legacies and Tithes, c. in which reſpects they are Courts of Juſtice; but it hath been adjudged, 2 Lev. 151.
at no Office in Fee is within the Statue.

Sect. 5. II. That one, who makes a Contract for an Office contrary to Hob. 75.
e Purport of the ſaid Statute, is ſo far diſabled to hold the ſame, that he Co. Litt. 234.
annot at any Time during his Life, be reſtored to a Capacity of holding it by Cro. Ca. 361.
ny Grant or Diſpenſation whatſoever. Cro. Ja. 386. Sal. 466, 468.

III. That a Bond by a Deputy of an Office to pay a certain Sum, at all 6 Mod. 234.
Events is within the Statute, and conſequently totally void, tho' it alſo con- 3 Co. 32. b. Cro. Eliz.
ain other Conditions which, if they ſtood by themſelves would be good; but 529, 530.
ot a Bond to pay Half the Profits, or a certain Sum out of the Profits of 1 And. 107. 150.
he Office for a Deputation.

IV. That the Statute extends not to Offices in the Plantations. Salk. 411. Quare 2 Mo. 45.

3 Inſt. 145. *Sect.* 6. As to the ſecond Point, *viz.* How Bribery is puniſhable; it is ſaid, That at Common Law, Bribery in a Judge, in relation to a Cauſe de-

1 H. H. P. C. 262. pending before him, was looked upon as an Offence of ſo heinous a Nature, that it was ſometimes puniſhed as High Treaſon before the 25 *Ed.* 3. And at

1 Leon. 295. Cro. Ja. 65. Ruſhw. Collections, part 1. fol. 31. this Day it is certainly a very high Offence, and puniſhable, not only with the Forfeiture of the Offender's Office of Juſtice, but alſo with Fine and Im-priſonment, *&c.*

Sect. 7. Alſo all the other above mentioned Kinds of Bribery, taken in a large Senſe, ſeem to be puniſhable with Fine and Impriſonment, *&c.* and in the Time of King *James* the Firſt, the Earl of *M.* Lord High Treaſurer

3 Inſt. 148. of *England*, being impeached by the Commons for refuſing to hear Petitions referred to him by the King, till he had received great Bribes, and for other ſuch like Miſdemeanors, was, by Sentence of the Lords, deprived of all his Offices, and diſabled to have any for the Future, or to ſit in the Parliament, and was fined fifty thouſand Pounds, and impriſoned during the King's Pleaſure. [82]

CHAP. LXVIII.

Of Extortion.

IN treating of Extortion, I ſhall conſider,

1. What ſhall be called Extortion;
2. How it ſhall be puniſhed.

Co. Lit. 368. 10 Co. 102. a. *Sect.* 1. As to the firſt Point it is ſaid, that Extortion in a large Senſe ſignifies any Oppreſſion under Colour of Right; but that in a ſtrict Senſe it ſignifies the Taking of Money by any Officer, by Colour of his Office, either where none at all is due, or not ſo much is due, or where it is not yet due.

2 Inſt. 209. Co. Lit. 368. *Sect.* 2. It is ſaid, That at the Common Law, which was affirmed by the Statute of *Weſtminſter* 1. 26. it was Extortion for any Sheriff or other Miniſter of the King, whoſe Office did any way concern the Adminiſtration or Execution of Juſtice, or the common Good of the Subject, to take any Reward whatſoever for doing his Office, except what he received from the King: And ſurely this was a moſt excellent Inſtitution, highly tending to promote the Honour of the King, and the Eaſe of the

42 Ed. 3. 4. b. 5. a. 2 Rol. Ab. 266. H. 1. People, and hath been always thought to conduce ſo much to the publick Good, that all Preſcriptions whatſoever which have been contrary to it have been holden to be void; and upon this Ground it hath been reſolved, That the Preſcription, by virtue whereof the Clerk of the Market claimed

4 Inſt. 274. Moore 523. 2 Inſt. 209. certain Fees for the View and Examination of all Weights and Meaſures, &c. was merely void.

21 H. 7. 17. 2 Inſt. 210. 2 Inſt. 176. S. P. C. 49. A. *Sect.* 3. But it hath been holden, That the Fee of twenty Pence, commonly called the Bar-Fee, which hath been taken, Time out of Mind, by the Sheriff, of every Priſoner who is acquitted, and alſo the Fee of one Penny, which was claimed by the Coroner of every Viſne, when he came before the Juſtices in Eyre, are not within the Meaning of the ſaid Statute, becauſe they are not demanded by the Sheriff or Coroner for doing any Thing relating to their Offices, but claimed as Perquiſites of Right belonging to them, whether they do any thing or not.

not. But there ſeemeth to be no Neceſſity for this Diſtinction, for it cannot be intended to be the Meaning of the Statute to reſtrain the Courts of Juſtice, in whoſe Integrity the Law always repoſes the higheſt Confidence, from allowing reaſonable Fees for the Labour and Attendance of their Officers: For the chief Danger of Oppreſſion is from Officers being left at their Liberty to ſet their own Rates on their Labour, and make their own Demands; but there cannot be ſo much Fear of theſe Abuſes, while they are reſtrained to known and ſtated Fees, ſettled by the Diſcretion of the Courts, which will not ſuffer them to be exceeded, without the higheſt Reſentment. 21 H. 7. 17. Co. Lit. 368.

Sect. 4. Alſo it having been found by Experience, That generally it is vain to expect that any Officers who depend upon a known fixed Salary, without having any immediate Benefit from any particular Inſtances of their Duty, ſhould be ſo ready in undertaking, or diligent in executing them, as they would be, if they were to have a preſent Advantage from them; it hath been thought expedient to permit them to take certain Fees in many Caſes, but it is certain that they are guilty of Extortion, if they take any Thing more: Alſo it hath been reſolved, That a Promiſe to pay them Money for the doing of a Thing, which the Law will not ſuffer them to take any thing for, is merely void, however freely and voluntarily it may appear to have been made; for if once it ſhould be allowed, That ſuch Promiſes could maintain an Action, the People would quickly be given to underſtand how kindly they would be taken, and happy would that Man be who could have his Buſineſs well done without them. 3 Inſt. 149. 2 Inſt. 210. Co. Lit. 368. 1 Rol. A. 16. Pl. 2, 3, 5. 26, 41. 1 Rol. R. 313. Noy 76. 1 Jones 65. Cro. El. 654. Moore 468. Cro. Ja. 103.

Sect. 5. As to the ſecond Point, *viz.* How Extortion ſhall be puniſhed, there is no doubt, but that at Common Law it is ſeverely puniſhable, at the King's Suit, by Fine and Impriſonment; and alſo by a Removal from the Office, in the Execution whereof it was committed. Alſo Extortion in Sheriffs, Eſcheators, Bailiffs, Gaolers, the King's Clerk of the Market, and other inferiour Miniſters and Officers of the King, whoſe Offices do any way concern the Adminiſtration or Execution of Juſtice, or the common Good of the Subject, or for the King's Service, have a farther additional Puniſhment by the above mentioned Statute of *Weſtminſter* 1. 26. by which it is enacted, *That no Sheriff, nor other King's Officer, ſhall take any Reward to do his Office, but ſhall be paid of that which they take of the King, and that he who ſo doth, ſhall yield twice as much, and ſhall be puniſhed at the King's Pleaſure.* 2 Rol. A. 32, 33, 75. Pl. 1, 2. Raymond 315. 2 Inſt. 209.

CHAP. LXIX.

Of Perjury.

OFFENCES under the Degree of capital, more immediately againſt the Subject, not amounting to an actual Diſturbance of the Peace, which may be committed by private Perſons, without any Relation to an Office; are either,

1. Such as are infamous, and groſly ſcandalous, proceeding from Principles of downright Diſhoneſty, Malice, or Faction.
2. Such as are of an inferiour Nature, and neither infamous, nor groſly ſcandalous.

Thoſe

Thoſe of the firſt Kind ſeem to be reducible to the following Heads;

1. Perjury, and Subornation of Perjury.
2. Forgery.
3. Cheats.
4. Conſpiracy.
5. Keeping of a Bawdy-houſe.
6. Libels

And firſt of Perjury, and Subornation of Perjury, of both which there are two Kinds:

1. By the Common Law.
2. By Statute.

Sect. 1. Perjury, by the Common Law, ſeemeth to be a wilful falſe Oath, by one who being lawfully required to depoſe the Truth in any Proceeding in a Courſe of Juſtice, ſwears abſolutely, in a Matter of ſome Conſequence to the Point in queſtion, whether he be believed, or not?

For the better Underſtanding whereof, I ſhall conſider the following Particulars:

1. How far this Offence muſt be wilful.
2. In what Kind of Proceedings it may be committed.
3. In what Caſes an Oath may be ſaid to be ſo far lawfully adminiſtred, that he who takes it may become guilty of Perjury.
4. In what Kind of Oaths Perjury may be committed.
5. Whether the Matter of the Oath muſt be falſe.
6. How far the Oath muſt be abſolute.
7. How far the Things ſworn ought to be material to the Point in Queſtion.
8. How far the falſe Oath muſt be credited.

5 Mod. 350.

Sect. 2. As to the firſt Particular, *viz.* How far this Offence muſt be wilful, it ſeemeth that no one ought to be found guilty thereof without clear Proof, That the falſe Oath alledged againſt him was taken with ſome Degree of Deliberation; for if upon the whole Circumſtances of the Caſe it ſhall appear probable, That it was owing rather to the Weakneſs than Perverſeneſs of the Party, as where it was occaſioned by Surprize, or Inadvertency, or a Miſtake of the true State of the Queſtion, it cannot but be hard to make it amount to voluntary and corrupt Perjury, which is of all Crimes whatſoever the moſt Infamous and Deteſtable.

Cro. El. 168, 169. Noy 128. 2 Rol. Ab. 257. Hob. 62.

Sect. 3. As to the ſecond Particular, *viz.* In what Kind of Proceedings this Offence may be committed, it ſeems to be clearly agreed, That all ſuch falſe Oaths as are taken before thoſe who are any ways intruſted with the Adminiſtration of publick Juſtice, in relation to any Matter before them in Debate, are properly Perjuries; and it ſeems to have been holden by ſome, That all ſuch falſe Oaths, as are taken before Perſons authorized by the King to examine Witneſſes in relation to any Matter whatſoever, wherein his Honour or Intereſt are concerned, are alſo puniſhable as Perjuries. And ſurely there can be no Offence of this Nature which will not juſtly deſerve a publick Proſecution, in as much as if it ſhould once prevail, it would make it impoſſible to have any Law whatſoever

ſoever duly executed, and expoſe the Lives, Liberties, and Properties, of the moſt Innocent, to the Mercy of the greateſt Villains: And therefore it hath been holden, That not only ſuch Perſons are indictable for Perjury, who take a falſe Oath in a Court of Record, upon an Iſſue therein joined, but alſo all thoſe who forſwear themſelves in a Matter judicially depending before any Court of [a] Equity, or Spiritual [b] Court, or any other [c] lawful Court, whether the Proceedings therein be of Record or not [d] or whether they concern the Intereſt of the King or Subject: And it is ſaid to be no way material, whether ſuch falſe Oath be taken in the Face of a Court, or before Perſons authorized by it to examine a Matter, the Knowledge whereof is neceſſary for the right Determination of a Cauſe; and [e] therefore, That a falſe Oath before a Sheriff, upon a Writ of Inquiry of Damages, is as much puniſhable as if it were taken before the Court on a Trial of the Cauſe. Alſo it ſeemeth, That any falſe Oath is puniſhable, as Perjury, which tends to miſlead the Court in any of their Proceedings relating to a Matter judicially before them, though it no way affect the principal Judgment which is to be given in the Cauſe; as where a [f] Perſon who offers himſelf to be Bail for another, knowingly, and wilfully ſwears that his Subſtance is greater than it is. Alſo it hath been reſolved, That not only ſuch Oaths as are taken upon judicial Proceedings, but alſo all ſuch as any way tend to abuſe the Adminiſtration of Juſtice, are properly Perjuries; as where one [g] takes a falſe Oath before a Juſtice of Peace, in order to induce him to compel another to find Sureties for the Peace, *&c.* or where a Perſon forſwears himſelf [h] before Commiſſioners appointed by the King to inquire of the Forfeitures of his Tenants Eſtates, *&c.* whereby he makes them liable to be ſeized by Exchequer-Proceſs: Alſo it hath been ſaid, That a falſe Oath is puniſhable as Perjury, in ſome Caſes, wherein the King's Honour or Intereſt is concerned, though it do not concern the Adminiſtration of Juſtice; as where one ſwears a falſe Oath concerning the Poſſeſſion of Lands, before Commiſſioners appointed by the King to inquire of ſuch Perſons whoſe Titles to the Lands in their Poſſeſſion are defective, and want the Supply of the King's Patents: And this is certainly an Offence of a very heinous Nature, [i] tending not only to fruſtrate the King's gracious Purpoſe, but to abuſe his Goodneſs by inducing him to grant his Patents to thoſe who are out of Poſſeſſion, and no way within the Intent of the Commiſſion, which, inſtead of quieting the Poſſeſſions of the Subjects, cannot but end in the greateſt Diſturbance of them. However it ſeemeth certain, That no Oath whatſoever in a mere private Matter, howſoever wilful or malicious it may be, is puniſhable as Perjury in a criminal Proſecution; for private Injuries are left to be redreſſed by private Actions; and upon this Ground it hath been holden, That a falſe Oath taken by one upon the making of a Bargain, that the Thing ſold is his own, is not puniſhable as Perjury. Alſo from what hath been ſaid it appears, That the Notion of Perjury is confined to ſuch publick Oaths only as affirm or deny ſome Matter of Fact, contrary to the knowledge of the Party; and therefore, That it doth not extend to any promiſſory Oaths whatſoever; from which it clearly follows, That no Officer, publick or private, who neglects to execute his Office in Purſuance of his Oath, or acts contrary to the Purport of it, is indictable for Perjury, in reſpect of ſuch Oath; yet it is certain, That his Offence is highly aggravated by being contrary to his Oath, and therefore, that he is liable to the ſeverer Fine on that Account.

[a] Cro. El. 907. Skin. 327. 1 Sid. 418. 1 Rol. A. 40. Pl. 16, 17, 18, 20, 21. 5 Mod. 348.
[b] Cro. El. 185, 609. 2 Rol. Re. 410. 1 Rol. A. 40. Pl. 12. 1 Leon. 131. Con. Dy. 243. Pl. 53.
[c] 2 Rol. Ab. 257. Pl. 2.
[d] 12 Co. 101. Cro. Ja. 212. Con. Cro. Ja. 120. Vide Sect. 18.
[e] 1 Rol. Ab. 39. Pl. 3. 42, 27.
[f] Cro. Ca. 146.
[g] 2 Rol. Re. 410. 2 Rol. Ab. 77. Pl. 5.
[h] Noy 100. Moor 627.
[i] Hob. 62. Cont. 1 Vent. 369, 370. 3 Rol. Ab. 257. Pl. 4. 2 Rol. Ab. 257. Pl. 5. 3 Inſt. 166.

Sect. 4. As to the third Particular, *viz.* In what Caſes an Oath may be ſaid to be ſo far lawfully adminiſtred, that he who takes it may be-

come guilty of Perjury by ſwearing falſly; it ſeemeth clear, That no Oath whatſoever taken before [a] Perſons acting merely in a private [b] Capacity, or [c] before thoſe who take upon them to adminiſter Oaths of a publick Nature, without legal Authority for their ſo doing, or [d] before thoſe who are legally authorized to adminiſter ſome kinds of Oaths, but not thoſe which happen to be taken before them, or even [e] before thoſe who take upon them to adminiſter Juſtice by Virtue of an Authority ſeemingly colourable, but in Truth unwarranted and meerly void, can ever amount to Perjuries in the Eye of the Law, becauſe they are of no Manner of Force, but are altogether idle: And from the ſame Ground it ſeemeth alſo clearly to follow, That no falſe Oath in an Affidavit, made before Perſons falſly pretending to be authorized by a Court of Juſtice to take Affidavits in relation to Matters depending before ſuch Court, can properly be called Perjury, becauſe no Affidavit, is any way regarded, unleſs it be made before Perſons legally intruſted with a Power to take it, as being both of ſufficient Ability to ask all proper Queſtions of the Party who ſhall make ſuch Affidavit, and alſo of ſuch Integrity as not to ſuffer any Thing to be inſerted therein, to the Truth whereof the Party hath not ſworn. And though it may be ſaid, That an Affidavit taken before Perſons falſly pretending to be commiſſioned for ſuch Purpoſe by the Courts of Juſtice, doth directly tend to impoſe upon ſuch Courts, and may poſſibly happen through Surprize to be read, and may alſo in its own Nature be altogether as heinous, as if it had been made before Perſons regularly impowered to take it; yet inaſmuch as it is of it ſelf of no manner of Validity, and is no otherwiſe regarded, than as it hath the Appearance of being ſworn before Perſons legally commiſſioned, without which it would have no manner of Credit, it ſeemeth that Offences of this Nature are moſt properly puniſhed, by ſeverely chaſtiſing thoſe who uſurp ſuch an Authority of adminiſtring of Oaths, without any legal Warrant. However it hath been adjudged, That a falſe Oath, taken before Perſons who having been commiſſioned to examine Witneſſes, happen to proceed after the Demiſe of the King who gave them their Commiſſion, and before Notice thereof, may be puniſhed as Perjury; for it would be of the utmoſt ill Conſequence to make ſuch Proceedings void; and therefore though all ſuch Commiſſions be in Strictneſs legally determined by the Demiſe of the King, who gave them, without any Notice; yet for the Neceſſity of the Caſe, whatever is done under them before ſuch Notice, muſt be ſuffered to ſtand good; for otherwiſe the moſt innocent and moſt deſerving Subjects would be unavoidably expoſed to numberleſs Proſecutions for doing their Duties, without any Colour of a Fault. And *Quære*, Whether a Perjury in a Court whoſe Proceedings are afterwards reverſed by Error, may not ſtill be puniſhed as Purjury, notwithſtanding ſuch Reverſal.

[a] 2 Rol. Ab. 257. 3 Inſt. 165. Yelv. 72.
[b] Cro. El. 169. 3 Inſt. 165.
[c] 1 Sid. 274. 2 Rol. Ab. 257. Pl. 6. Latch 38, 132.
[d] Yelv. 111. 3 Inſt. 166. See 4 Inſt. 97, 98. 29 Ca. 2. 25. 2 Rol. Re. 427. 4 Inſt. 278.
3 Inſt. 165.
Cro. Ca. 97, 98, 99.
1 Ventr. 181. 1 Syd. 148.
[f] 1 Rol. Ab. 40. Pl. 15, 83. Pl. 9. Cro. El. 609.
[g] 1 Leon. 127. Cro. El. 135, 905. 1 Rol. Ab. 40. Pl. 16, 17, 18. 69. Pl. 42. 1 Sid. 244.
[h] 1 Rol. Re. 79. Noy 128. 5 Mod. 348. Moor 656. Pl. 900. 2 Keb. 452. 2 Rol. Ab. 77. Pl. 4, 5.

Sect. 5. As to the fourth Particular, *viz.* In what kind of Oaths Perjury may be committed, it ſeemeth clear, That a Man may be in Danger of being guilty thereof, not only in reſpect of a falſe Oath, taken by him as a Witneſs for another, but alſo in reſpect of a falſe Oath taken by him in his own Cauſe, either in an Anſwer to Queſtions put to him in a Court of [f] Law or [g] Equity, having Power to purge him upon Oath concerning his Knowledge of the Matters in Diſpute, or in his [h] Affidavit concerning ſome collateral Matter, wherein the Parties own Oaths are allowed to be taken. But it ſeems, That a Juror who gives a Verdict contrary to manifeſt Evidence, is not properly guilty of Perjury within the above mentioned Deſcription, becauſe he is not ſworn to depoſe the Truth, but only

only to give a true Judgment upon the Depoſition of others, and in many Caſes is not puniſhable at all *in foro humano*, as ſhall be ſet forth more at large in the Chapter of Conſpiracy.

Sect. 6. As to the fifth Particular, *viz.* How far the Matter of the Oath which may amount to Perjury, muſt be falſe, it [d] is ſaid not to be material whether the Fact which is ſworn, be in itſelf true or falſe; for howſoever the Thing ſworn may happen to prove agreeable to the Truth, yet if it were not known to be ſo by him who ſwears to it, his Offence is altogether as great as if it had been falſe inaſmuch as he wilfully ſwears, That he knows a Thing to be true, which at the ſame Time he knows nothing of, and impudently endeavours to induce thoſe before whom he ſwears to proceed upon the Credit of a Depoſition, which any Stranger might make as well as he.

[d] Palm. 294. Hetley 97. 2 Rol. Ab. 77. Pl. 5. 3 Inſt. 166. Con. 3 Mod. 122.

Sect. 7. As to the ſixth Particular, *viz.* How far the Oath muſt be abſolute, it is ſaid, That no Oath ſhall amount to Perjury unleſs it be ſworn abſolutely and directly; and therefore, That he who ſwears a Thing according as he thinks, remembers or believes, cannot in reſpect of ſuch an Oath be found guilty of Perjury.

3 Inſt. 166.

Sect. 8. As to the ſeventh Particular, *viz.* How far the Thing ſworn ought to be material to the Point in Queſtion, it ſeemeth clear, That if the Oath for which a Man is indicted of Perjury, be wholly foreign from that Purpoſe, or altogether immaterial, and neither any way pertinent to the Matter in Queſtion, not tending to aggravate or extenuate the Damages, nor likely to induce the Jury to give a readier Credit to the ſubſtantial Part of the Evidence, it cannot amount to Perjury, becauſe it is meerly idle and inſignificant; as if upon a Trial, in which the Queſtion is, whether ſuch a one was *Compos* or not, a Witneſs introduces his Evidence by giving a Hiſtory of a Journey which he took to ſee the Party, and happens to ſwear falſly in Relation to ſome of the Circumſtances of the Journey. Alſo it hath been adjudged, That where a Witneſs being asked by a Judge, whether *A.* brought a certain Number of Sheep from one Town to another all together? anſwered, That he did ſo; where in Truth *A.* did not bring them all together, but Part at one Time and Part at another, yet ſuch Witneſs was not guilty of Perjury, becauſe the Subſtance of the Queſtion was, Whether *A.* did bring them at all or not, and that manner of bringing them was only a Circumſtance. And upon the ſame Ground is ſaid to have been adjudged, That where a Witneſs being asked, whether ſuch a Sum of Money were paid for two Things in Controverſy between the Parties? anſwered, That it was, where in Truth it was paid only for one of them by Agreement, ſuch Witneſs ought not to be puniſhed for Perjury; becauſe as the Caſe was it was no way material whether it were paid for one or both. Alſo it is ſaid to have been reſolved, That a Witneſs who ſwore that one drew his Dagger and beat and wounded J. S. where in Truth he beat him with a Staff, was not guilty of Perjury, becauſe the beating only was material. But perhaps in all theſe Caſes it ought to be intended, That the Queſtion was put in ſuch a Manner, that the Witneſs might reaſonably apprehended that the ſole Deſign of putting him was to be informed of the ſubſtantial Part of it, which might induce him through Inadvertency to take no Notice of the circumſtantial Part, and give a general Anſwer to the ſubſtantial; for otherwiſe, if it appear plainly, That the Scope of the Queſtion was to ſift him as to his Knowledge of the Subſtance, by examining him ſtrictly concerning the Circumſtances, and he give a particular and diſtinct Account of the Circumſtances, which afterwards appears to be falſe; ſurely he cannot but be

Vide infra Sect. 22. Aleyn 79. 1 Rol. Ab. 41. Pl. 25. 78. Pl. 3. Cro. El. 500. Salk. 514. Noy 36. 2 Rol. Re. 145. Cro. Ca. 321. Hob. 53. Carth. 422. 5 Mod. 345, 348.

2 Rol. Re. 41.

2 Rol. Re. 42.

Hetley 97.

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guilty of Perjury, inaſmuch as nothing can be more apt to incline a Jury to give Credit to the ſubſtantial Part of a Man's Evidence, than his appearing to have an exact and particular Knowledge of all the Circumſtances relating to it. And upon theſe Grounds, I cannot but think the Opinion of thoſe Judges very reaſonable, who held, That a Witneſs was guilty of Perjury, who in an Action of Treſpaſs for breaking the Plaintiff's Cloſe, and ſpoiling it with Sheep, depoſed that he ſaw thirty or forty Sheep in the ſaid Cloſe, and that he knew them to be the Defendant's, becauſe they were marked with ſuch a Mark, which he knew to be the Defendant's Mark, where in Truth the Defendant never uſed ſuch a Mark; for the giving ſuch a ſpecial Reaſon for his Remembrance could not but make his Teſtimony more credible than it would have been without it; and though it ſignified nothing to the Merits of the Cauſe, whether the Sheep had any Mark at all or not, yet inaſmuch as the aſſigning ſuch a Circumſtance in a Thing immaterial had ſuch a direct Tendency to corroborate the Evidence concerning what was moſt material, and conſequently was equally prejudicial to the Party, and equally criminal in its own Nature, and equally tending to abuſe the Adminiſtration of Juſtice, as if the Matter ſworn had been the very Point in Iſſue, there doth not ſeem to be any Reaſon why it ſhould not be equally puniſhable. But I cannot find this Matter any where thoroughly ſettled or debated, and therefore ſhall leave it to every Man's own Judgment, which from the Conſideration of the Circumſtances of each particular Caſe, may generally without any great Difficulty diſcern whether the Matter in which Perjury is aſſigned, were wholly impertinent, idle, and inſignificant, or not, which ſeems to be the beſt Rule for determining whether it be puniſhable as Perjury or not. But it is ſaid in *Siderfin*, ſpeaking as I ſuppoſe of an Anſwer in Chancery, that a Man may be guilty of Perjury at the Common Law by ſwearing a Thing not material; but ſurely this ought not to be underſtood in ſo great a Latitude, as if it were meant that every Falſity in ſuch an anſwer muſt needs be Perjury, howſoever foreign, circumſtantial and trivial the Point wherein it is aſſigned may be, which is directly contrary to what ſeems to be clearly taken for granted in other Books. And therefore perhaps where it is ſaid that a Man may be guilty of Perjury in a Thing not material, no more may be meant, but that he may be as well guilty thereof, by anſwering to a Matter not charged in the Bill, as by anſwering to the Matters therein contained, which may alone be ſaid to be material, becauſe the Defendant is not obliged in his Anſwer to take Notice of any thing elſe; or elſe perhaps the Meaning may be, That in a Proſecution for Perjury at Common Law, ſetting forth a falſe Oath in ſuch an Anſwer, relating to the Thing ſaid to be in Variance, the Falſity ſhall be intended *primâ facie* to have been ſome way material in the Cauſe, unleſs the contrary be proved by the other Side: Whereas in all Proſecutions upon the Statute, it is neceſſary expreſly to ſhew in what manner the falſe Oath is material to the Cauſe in Queſtion, becauſe that Statute, extending only to ſuch Perjuries whereby ſome Perſon is grieved, cannot maintain a Proſecution which does not bring the Caſe within the Purview of it, by ſhewing that ſome one was grieved by the Injury complained of, which he could not be, unleſs the Thing ſworn were ſome way material. However it ſeemeth to be clear, That a Man may as well be guilty of Perjury by a falſe Oath tending to extenuate or aggravate the Damages, as by an Oath which is direct to the Fact in Iſſue.

2 Rol. Re. 368. Palm. 382.

1 Sid. 274.

1 Keb. 935, 941.

Vide infra Sect. 23.

Cro. Ja. 212. 12 Co. 101. 2 Leon. 198.

Sect. 9. As to the eighth Particular, *viz.* how far the falſe Oath muſt be credited, it hath been holden not to be material upon an Indictment of Perjury at Common Law, whether the falſe Oath were at all credited or whether the Party in whoſe Prejudice it was intended, were in the Event any way aggrieved by it or not, inaſmuch as this is not a Proſecution grounded on the Damage to the Party, but on the Abuſe of publick Juſtice. 3 Leon. 230. 2 Leon. 211.

Sect. 10. Subornation of Perjury by the Common Law, ſeems to be an Offence in procuring a Man to take a falſe Oath amounting to Perjury, who actually takes ſuch Oath; but it ſeemeth clear, That if the Perſon incited to take ſuch an Oath do not actually take it, the Perſon by whom he was ſo incited is not guilty of Subornation of Perjury; yet it is certain, That he is liable to be puniſhed not only by Fine, but alſo by infamous corporal Puniſhment. 1 Rol. Ab. 41. Pl. 21, 57. Pl. 5; 79. Pl. 2. Yelv. 72. Cro. Ja. 158. Cro. Ca. 337. 2 Keb. 399. 3 Mod. 122. Far. 101.

Sect. 11. Thus far of Perjury and Subornation of Perjury by the Common Law, and now I ſhall proceed to examine in what Manner theſe Offences are reſtrained by Statute; as to which it is to be obſerved, that it is enacted by 5 *El.* 9. *That whoever ſhall unlawfully and corruptly procure any Witneſs, or Witneſſes by Letters, Rewards, Promiſes, or by any other ſiniſter and unlawful Labour or Means whatſoever, to commit any wilful and corrupt Perjury, in any Matter or Cauſe whatſoever, depending in Suit and Variance, by any Writ, Action, Bill, Complaint or Information, in any wiſe concerning any Lands, Tenements or Hereditaments, or Goods, Chattels, Debts or Damages, in any of the King's Courts of Chancery,* White-hall, *or elſewhere, within any of the King's Dominions of* England *or* Wales, *or the Marches of the ſame, where any Perſon or Perſons ſhall have Authority by Virtue of the King's Commiſſion, Patent or Writ, to hold Plea of Land, or to examine, hear, or determine, any Title of Lands, or any Matter or Witneſſes concerning the Title, Right, or Intereſts of any Lands or Tenements, or Hereditaments, or in any of the King's Courts of Record, or in any Leet, View or Frank-Pledge or Law-Day, Ancient Demeſne-Court, Hundred-Court, Court-Baron, or in the Court or Courts of the Stannary in the Counties of* Devon *and* Cornwal, *or ſhall unlawfully and corruptly procure or ſuborn any Witneſs or Witneſſes, who ſhall be ſworn to teſtify* in perpetuam rei Memoriam, *ſhall for ſuch Offence being thereof lawfully convicted or attainted, forfeit the Sum of forty Pounds. And if any ſuch Offender ſo being convicted or attainted, ſhall not have any Goods or Chattels, Lands, or Tenements, to the Value of forty Pounds, that then every ſuch Perſon ſhall ſuffer Impriſonment by the Space of one half Year without Bail or Mainprize, and ſtand upon the Pillory the Space of one whole Hour, in ſome Market-Town, next adjoining to the Place where the Offence was committed, in open Market there, or in the Market-Town it ſelf where the Offence was committed.*

Sect. 12. Alſo it is farther enacted by the ſaid Statute, Par. 5. *That no Perſon being ſo convicted or attainted, ſhall from thenceforth be received as a Witneſs in any Court of Record, in any of the King's Dominions of* England, Wales, *or the Marches of the ſame, till ſuch Judgment againſt him ſhall be reverſed by Attaint, or otherwiſe; and that upon every ſuch Reverſal, the Party grieved ſhall recover Damages againſt the Party who did procure the ſaid Judgment ſo reverſed to be firſt given,* &c. See 1 Sid. 216.

Sect. 13. And it is farther enacted Par. 6. *That if any Perſon or Perſons ſhall either by the Subornation, unlawful Procurement, ſiniſter Perſwaſion, or by Means of any other, or by their own Act, Conſent or Agreement, wilfully, and corruptly commit any Manner of wilful Perjury, by his or their Depoſition, in any of the Courts before mentioned, or being examined* ad perpetuam rei Memoriam, *that then every ſuch Offender being duly convicted or attainted ſhall forfeit twenty*

Pounds, and have Impriſonment by the Space of ſix Months without Bail *or Mainprize; and the Oath of ſuch Offender ſhall not from thenceforth be received in any Court of Record in* England *or* Wales, *until ſuch Judgment ſhall be reverſed,* &c. *on which Reverſal the Party grieved ſhall recover Damages in the Manner before mentioned.* And it is farther enacted Par. 7. *That if ſuch Offender ſhall not have Goods or Chattels to the Value of twenty Pounds, That then ſuch Perſon ſhall be ſet on the Pillory in ſome Market-Place within the Shire, City, or Borough, where the Offence ſhall be committed, by the Sheriff or his Miniſters, if it ſhall fortune to be without any City or Town-Corporate; and if it happen to be within any ſuch City or Town-Corporate, then by the head Officer of ſuch City,* &c. *where he ſhall have both Ears nailed,* &c.

Sect. 14. And it was farther enacted Par. 8. 9. *That one Moiety of the ſaid Forfeiture ſhall be to the King, and the other Moiety to ſuch Perſon as ſhall be grieved, hindred, or moleſted, by Reaſon of any of the Offences before mentioned, that will ſue for the ſame,* &c. *and that as well the Judge and Judges of every ſuch of the ſaid Courts where any ſuch Suits ſhall be, and whereupon any ſuch Perjury ſhall be committed, as alſo the Juſtices of Aſſize and Gaol-Delivery, and Juſtices of Peace at their Quarter-Seſſions, both within the Liberties and without, may enquire of, hear, and determine all Offences againſt the ſaid Act.*

Sect. 15. But it is provided Par. 11. *That the ſaid Act ſhall no way extend to any Spiritual or Eccleſiaſtical Court, but that every ſuch Offender as ſhall offend in Form, as aforeſaid, ſhall be puniſhed by ſuch uſual and ordinary Laws as are uſed in the ſaid Courts.*

Sect. 16. Alſo it is provided Par. 13. *That the ſaid Statute ſhall not reſtrain the Authority of any Judge, having abſolute Power to puniſh Perjury before the Making thereof, but that every ſuch Judge may proceed in the Puniſhment of all Offences, puniſhable before the making of the ſaid Statute, in ſuch wiſe as they might have done, and uſed to do, to all Purpoſes, ſo that they ſet not upon the Offender leſs Puniſhment than is contained in the ſaid Act.* From whence it ſeemeth undoubtedly to follow, That the Court of King's Bench, *&c.* proceeding upon an Indictment, or Information of Perjury or Subornation of Perjury at Common Law, may not only ſet a diſcretionary Fine on the Offender, but alſo condemn him to the Pillory, without making any Inquiry concerning the Value of his Lands or Goods.

But for the better Underſtanding of the other Parts of this Statute I ſhall conſider the following Particulars:

1. How far the very Words of the Statute muſt be purſued in a Proſecution grounded thereon.
2. In what kind of Oaths one may incur the Danger thereof.
3. How far the falſe Oath muſt appear to have been prejudicial to ſome Perſon.

Sect. 17. As to the firſt of theſe Particulars it hath been holden, That in every Proſecution on this Statute the Words thereof muſt be exactly purſued, and therefore that an Indictment or Action on the ſaid Statute, alledging that the Defendant depoſed ſuch a Matter [a] *falſo & deceptivè*, [b] *falſo & corruptè*, or [c] *falſo & voluntarie*, without expreſly ſaying, that he did it *voluntarie & corrupte*, is not good; and that ſuch a Defect cannot [d] ſupplied by adding the Words *contra formam Statuti*, or concluding & *voluntarium & corruptum commiſit Perjurium:* Alſo it hath been [e] holden That it is neceſſary expreſly to alledge that the Defendant was ſworn, and therefore that it is not ſufficient to ſay, that *tacto per ſe ſacro Evangelio ſe depoſuit.*

[a] 2 Leon. 211. 3 Leon. 230. Shower 190.
[b] Hetl. 12. Cro. El. 147.
[c] Savil 43.
[d] 2 Leon. 214. 3 Leon. 230. Het. 12. Savil 43. Cro. El. 147.
[e] Cro. El. 105.

Sect. 18. However it hath been reſolved, That it is not neceſſary to ſhew whether the Party, who is accuſed of Perjury, did take the falſe Oath through the Subornation of another, or without any ſuch Subornation, notwithſtanding the Words of the Statute are, *if any Perſon either by the Subornation, unlawful Procurement, ſiniſter Perſwaſion, or Means of any other, or by their own Act, Conſent or Agreement commit wilful Perjury*, &c. for inaſmuch as there is no Medium between the two Branches of this Diſtinction, ſo that all Perjury whatſoever muſt needs come within one of them; and it is no way material under which of them it doth come, it is a reaſonable Expoſition to look on the ſaid Words as put into the Statute *ex abundanti*, ſeeing they expreſs no more than the Law muſt needs have implied without them; from whence it follows, That they operate no more than if they had not been expreſſed, and conſequently ſhall not oblige the Proſecutor neceſſarily to purſue them, which would put him under the Difficulty not only of proving the Perjury, which alone is material, but alſo of ſhewing it to be within one of the Branches of the ſaid Diſtinction, which is nothing to the Purpoſe. 3 Bulſt. 147. Vide ſupra Ch. 10. Sect. 8.

Sect. 19. As to the ſecond of the above mentioned Particulars, *viz.* In what kind of Oaths one may incur the Danger of this Statute, it hath been reſolved, That no one can be guilty of Perjury within the Meaning thereof, in any Caſe wherein a Man may not poſſibly be guilty alſo of Subornation of Perjury within the ſame Statute; for it is very reaſonable to give the whole Statute the ſame Conſtruction; nor can it well be intended, that the Makers thereof, who expreſly inflict a greater Penalty on Subornation of Perjury, than on the Perjury it ſelf, ſhould mean to extend the Purview of the Law in relation to what they eſteemed the leſſer Crime, farther than in relation to that which they eſteemed the greater; from whence it hath been argued and determined, That becauſe that Part of the Statute, which concerns Subornation of Perjury, extends only to Subornation of Perjury in *Matters depending in Suit by Writ, Action, Bill, Plaint, or Information, in any wiſe concerning Lands, Tenements, or Hereditaments, or Goods, Chattels, Debts, or Damages*, &c. therefore the following Clauſe concerning Perjury it ſelf, tho' it be penned in more general Words, ſhall come under the ſame Reſtriction. And from hence it clearly follows, That no Perjury upon an Indictment, or criminal Information, can bring a Man within the Danger of this Statute, becauſe they are omitted in the above mentioned Clauſe. Alſo upon this Ground it ſeems eaſy to account for the Judgment in *Price*'s Caſe, who being indicted for a Perjury ſuppoſed to be committed by him in an Information for the King, which as I ſuppoſe muſt be intended to have been a criminal one, was diſcharged upon an Exception taken to the Indictment; but if the Information whereon the ſaid Perjury was ſuppoſed to have been committed, had been of a civil Nature, I do not ſee any Reaſon why it ſhould not be as well within the Meaning, as it ſeems to be expreſly within the Words of the Statute; for ſurely the Opinion, That the King cannot by Indictment, which is his own proper Suit, puniſh his own Witneſs, who ſwears for him, cannot be agreeable to Law, becauſe however the Perjury of ſuch a Witneſs may ſeem to tend to promote the King's Intereſt in relation to the Cauſe which happens to be in Diſpute; yet certainly it is as heinous a Crime in its own Nature, and as much an Abuſe to Juſtice, and of the ſame ill Conſequence to the Publick, and conſequently as worthy of the King's Reſentment, as if it had been taken againſt him. 5 Co. 99. a. Cro. Ja. 120. 3 Inſt. 164.

Sect. 20. Alſo it hath been reſolved, that this Statute extends to no other Perjury except that of a Witneſs, not only becauſe the Clauſe con-

concerning Subornation, to which the ſubſequent Clauſe concerning Perjury hath a Reference, relates to Perjury by Witneſſes only, but alſo becauſe the Clauſe concerning Perjury mentions only Perjury committed by Perſons in their Examinations, *ad perpetuam rei memoriam*, or elſe in their Depoſitions in ſome of the Courts above mentioned, which in common Speech are taken for ſuch Oaths only as are taken by a Witneſs; and from hence it follows, That no one can come within the Statute by Reaſon of any falſe Oath in an [a] Anſwer to a Bill in Chancery, or in [b] ſwearing the Peace againſt another, or in a [c] Preſentment made by him as Homager of a Court-Baron, or by Reaſon of a falſe [d] Wager of Law, or for taking a falſe Oath before [e] Commiſſioners appointed by the King to make an Inquiry concerning his Title to certain Lands.

[a] Cro. El. 148. 2 Leon. 201. Daliſ. 84. Yelv. 120.
[b] 2 Rol. Ab. 77. Pl. 5.
[c] 2 Leon. 201.
[d] 1 Noy 7, 108. Finch 450.
[e] Moore 627.

Sect. 21. Alſo it hath been ſaid, That he who makes a falſe Affidavit againſt a Man in a Court of Juſtice, is not within this Statute; but perhaps the Books wherein this Opinion is holden, ought to be intended only of ſuch Affidavits which no way relate to a Cauſe depending in Suit before ſuch Court; for if they be of ſuch a Nature, That either of the Parties in Variance be grieved, hindered, or moleſted in Reſpect of their Cauſe in ſuch Court by Reaſon of the Perjury; as where a Trial is put off, or a Judgment or Execution ſet aſide upon a falſe Affidavit, the Offence ſeems to be not only within the Meaning of the Statute, but alſo within the very Letter of it, unleſs the Words, Witneſſes and Depoſitions, are confined to ſo ſtrict a Signification, as to bear no kind of Application to any other Perſons or Oaths, except thoſe which are made uſe of upon the Trial of the Iſſue in Queſtion, for which I cannot find any good Authority. However partly perhaps from this Notion, and partly becauſe the Statute ſpeaks expreſly only of Depoſitions in the Courts above mentioned, it hath been queſtioned, Whether a falſe Oath before a Sheriff upon a Writ of Inquiry of Damages, be within the Statute or not? But if it be conſidered, That the Party to whoſe Prejudice ſuch a falſe Oath is taken, is as much grieved by it as if it had been taken in the very Court, and the principal Judgment of the Cauſe depends upon ſuch an Inquiry; and the Depoſitions made before the Sheriff, may as properly be ſaid to be Depoſitions in the Court, by which the Sheriff is commiſſioned to take the Inquiry, as Depoſitions taken before Juſtices of *Niſi Prius*, upon a Trial of an Iſſue joined in a ſuperior Court, which are undoubtedly within the Meaning of the Statute; and alſo inaſmuch as thoſe who give Evidence before a Sheriff upon ſuch an Inquiry may in the common Uſe of the Word, be as properly called Witneſſes, as thoſe who give Evidence before the Court in which an Iſſue is joined, it ſeemeth to be the more plauſible Opinion, that ſuch a Perjury is within the Statute: But ſince it is diſputable, whether it be ſo or no, and it is certain that it is Perjury at Common Law, and that in all Caſes whatſoever where a Man takes a falſe Oath, which is not Perjury within the Statute, but is looked on as Perjury at Common Law, he is ſtill puniſhable for it by Indictment or Information at the Common Law, it is certainly moſt adviſeable to proſecute ſuch an Offender at the Common Law, and not upon the Statute.

2 Rol. Ab. 77. Pl. 4. 1 Rol. Re. 79. 3 Keble 345.

Vide 2 Leon. 40.

1 Rol. Ab. 30. Pl. 3. 42. Pl. 27.

See the Authorities above cited.

Cro. Jac. 8.

Sect. 22. As to the third Particular, *viz.* How far the falſe Oath muſt appear to have been prejudicial to ſome Perſon, it hath been collected from the abovementioned Clauſe which giveth an Action to the Party grieved by the Offences mentioned in the Statute, That no falſe Oath is within the Meaning thereof, which does not give ſome Perſon a juſt Cauſe of Complaint; and upon this Ground it hath been ſaid, That

e who ſwears a Thing which is true, but not known by him to be ſo, is not within the Statute, becauſe howſoever heinous his Offence may be in its own Nature; yet, when it proves in the Event to be in Maintenance of the Truth, it cannot be ſaid to give him a juſt Cauſe of Complaint, who would take Advantage againſt another from his Want of legal Evidence to make out the Juſtice of his Cauſe. 3 Inſt. 166. Vide ſupra Sect 6. Con. Hetley 97.

Sect. 23. Alſo from the ſame Ground it ſeemeth clearly to follow, that no falſe Oath can be within the Statute, unleſs the Party againſt whom it was ſworn ſuffered ſome kind of Diſadvantage by it, for otherwiſe it cannot be ſaid that any one was grieved, hindred, or moleſted by it; and therefore it is certain, That in every Proſecution upon the Statute, it is neceſſary to ſet forth the Record of the Cauſe wherein the Perjury complained of is ſuppoſed to have been committed; and alſo to prove at the Trial of the Cauſe, that there is actually ſuch a Record, by producing the Record it ſelf, or a true Copy thereof, which muſt agree with that which is ſet forth in the Pleadings, without any material Variance; for otherwiſe it cannot legally appear, That there ever was ſuch a Suit depending, wherein the Party might be prejudiced in the Manner ſuppoſed: Alſo it ſeems to be agreed, That it is neceſſary not only to ſet forth the Point wherein the falſe Oath was aſſigned, but alſo to ſhew in what Manner it conduced to the Proof or Diſproof of the Matter in Debate between the Parties; and it hath been adjudged, That an Indictment ſetting forth a Suit concerning the Manor of *Dale*, and aſſigning a falſe Oath concerning the Manor (*Manerium prædictum innuendo*) is not good, becauſe it no otherwiſe appears, That the falſe Oath did concern the Manor of *Dale*, but by the *Innuendo*, which is not a ſufficient Averment. Alſo upon the ſame Ground it ſeems to be ſafeſt in a Proſecution upon the Statute for a falſe Oath in Chancery, to ſet forth the Bill and Anſwer, That the Plaintiff may appear to have been aggrieved by it; and for the ſame Reaſon it ſeemeth alſo, That you ought, in ſuch a Proſecution of a Witneſs in Chancery, to ſet forth the Interrogatory in Particular, and to ſhew how it was material: Alſo it hath been reſolved, That as in an Action on the Statute brought by one Perſon, it muſt appear, That the falſe Oath was prejudicial to the Plaintiff; ſo in an Action by more than one, it muſt appear to have been prejudicial to every one of the Plaintiffs: And it hath been ſaid, That it is not ſufficient to ſhew that the falſe Oath cauſed the Court to make an Award againſt the Plaintiff, unleſs it alſo appear that ſuch an Award was prejudicial to him, and therefore where the Plaintiff at a Trial in Ejectment challenged a Juror, and proved his Challenge by a falſe Oath, by reaſon whereof the Inqueſt was not taken, and conſequently the Poſſeſſion of the Defendant, who had a defeaſible Title, continued longer than it otherwiſe would have done; it hath been adjudged, That ſuch a Defendant cannot have an Action on the Statute againſt ſuch Witneſs, becauſe in Truth he gained no Advantage by the Perjury. Alſo it hath been holden, That it is not ſufficient to ſhew that the Perjury, for which an Action is brought upon the Statute, was actually prejudicial to the Plaintiff, unleſs it be alſo ſhewn to have been made in ſome Cauſe which may properly be ſaid to have been depending in Suit between him and the Perſon for whom the Witneſs was examined; and therefore it hath been holden, That where *A.* brought a Bill in Chancery againſt *B.* and the Lord Keeper, by an Order made *C.* to be as a Party to the Bill againſt *B.* and afterwards a Commiſſion went forth to examine Witneſſes between *B.* and *C.* upon which *D.* being produced as a Witneſs on the Part of *C.* ſwore directly

Coke Ent. 164. 6 Mod. 168. 2 Rol. Re. 76. 1 Keb. 452, 935, 941. Raym. 202. 2 Leon. 12. 2 Rol. Re. 427. Cro. Ca. 351, 352, 353. 1 Keb. 452. Cro. El. 428. 1 Keb. 935, 941. 1 Sid. 106. 2 Leon. 12. 3 Leon. 68. 2 Leon. 40.

Yelv. 8. for him againſt *B.* whereupon a Decree was made againſt *B.* yet *B.* cannot have an Action on the Statute, becauſe *C.* was not a Party to the Suit, but came in *à Latere*, by an Order; and it is ſaid, That the Words of the Statute are, *where one is grieved by a Depoſition in a Suit between Party and Party*; but perhaps the Authority of this Opinion may juſtly be queſtioned, not only becauſe the Words of the Statute whereon it is grounded are miſtaken, but alſo becauſe the Offence ſeems in Truth to be both within the Meaning and Letter of the Law, ſince thereby a Perſon is grieved in reſpect of a Cauſe depending in Suit in a Court mentioned in the Statute: However

2 Leon. 198. there ſeems to be no Doubt, but that a Perjury which only tends to increaſe or

1 Keb. 9. leſſen the Damages to be given to a Plaintiff, is as much within the Statute,

Raymond 74. as any Perjury which goes directly to the the Point of the Iſſue: Alſo it

1 Sid. 148. ſeemeth to be ſettled, That Perjury in a Cauſe wherein an erroneous Judg-

2 Keb. 718, 854. ment is given, is a good Foundation of a Proſecution upon the Statute,

1 Keb. 531. while ſuch Judgment ſtands unreverſed.

For late Statutes concerning Perjury, ſee the Additions [83] [84]

CHAP. LXX.

Of Forgery.

OF Forgery there are two Kinds:

1. By the Common Law.
2. By the Statute.

Sect. 1. Forgery by the Common Law ſeemeth to be an Offence in falſly and fraudulently making or altering any Matter of Record, or any other authentick Matter of a publick Nature; as a Pariſh Regiſter, or any Deed or Will.

For the better Underſtanding whereof, I ſhall endeavour to ſhew

1. In what Caſes the Making or Altering of a Writing, ſhall be ſaid to be ſo far falſe and fraudulent, as to amount to Forgery.
2. That a Man may be guilty of Forgery in reſpect of all the above mentioned Writings, and of no other.

Sect. 2. As to the firſt Particular, it is ſaid to be poſſible for a Man knowingly to make a Deed in his own Name, and alſo to ſign and ſeal himſelf, which yet in Judgment of Law may be no better than a downright Forgery; as if a Man make a Feoffment of certain Lands to *J. S.*

3 Inſt. 169. Pult. 46. b. 27 H. 6. 3. and afterwards make a Deed of Feoffment of the ſame Lands to *J. D.* of a Date prior to that of the Feoffment to *J. S.* in which Caſe he is ſaid to be guilty of Forgery, becauſe he knowingly falſifies the Date in order to defraud his own Feoffee, by making a ſecond Conveyance which at the Time he had no Power to make: Alſo it is ſaid, That his

Moore 655. Crime would have been no leſs, if by his Conveyance he had paſſed only an equitable Intereſt for good Conſideration, and had afterwards by

Noy 101. Moore 759, 760. ſuch a ſubſequent antedated Conveyance endeavoured to avoid it. Alſo in many other Caſes a Writing may be ſaid to be forged where neither

3 Inſt. 170. Con. Dy. 288. b. the Hand nor Seal of any one are forged; as where one being directed to draw up a Will for a ſick Perſon, doth inſert ſome Legacies therein

his own Head; or where one finding another's Name at the Bottom of a Letter at a conſiderable Diſtance from the other Writing, cauſes the Letter to be cut off, and a general Releaſe to be written above the Name, and then takes off the Seal, and fixes it under the Releaſe; or where one inſerts into an Indictment the Names of thoſe againſt whom in Truth it was not found; or where one makes any fraudulent Alteration of the Form of a true Deed in a material Part of it; as by making a Leaſe of the Manor of *Dale* appear to be a Leaſe of the Manor of *Sale*, by changing the Letter *D.* into an *S.* or by making a Bond for five hundred Pounds, expreſſed in Figures, ſeem to have been made for five Thouſand, by adding a new Cypher. But Sir *Edward Coke* ſeems to ſay, That a Deed ſo altered may more properly be called a falſe than a forged Writing, becauſe it is not forged in the Name of another, nor his Seal nor Hand counterfeited. But I ſee no good Reaſon why ſuch an Alteration of a Deed ſhould not as properly be called Forgery, as the entire Making of a new Deed in another's Name; for in both Caſes not only the Fraud and Villany are the very ſame, but alſo a Man's Hand and Seal are falſly made uſe of to teſtify his Aſſent to an Inſtrument, which after ſuch an Alteration is no more his Deed than a Stranger's. Alſo the Notion of Forgery doth not ſeem ſo much to conſiſt in the counterfeiting a Man's Hand and Seal, which may often be done innocently, but in the endeavouring to give an Appearance of Truth to a mere Deceit and Falſity, and either to impoſe that upon the World as the ſolemn Act of another, which he is no way privy to, or at leaſt to make a Man's own Act appear to have been done at a Time when it was not done, and by Force of ſuch a Falſity to give it an Operation, which in Truth and Juſtice it ought not to have, as appears by the foregoing Caſes in this Section, to moſt of which Sir *Edward Coke* himſelf ſeems to agree.

3 Inſt. 171.

3 Mod. 66.

3 Inſt. 169. Moore 619.

3 Inſt. 169.

Vide Moore 619. 3 Mod. 66.

Vide 2 Rol. Ab. 28, 29. 11 Co. 27.

Sect. 3. But it ſeemeth to be clear, That he who writes a Deed in another's Name, and ſeals it in his Preſence, and by his Command, is not guilty of Forgery, becauſe the Law looks on this as the other's own Sealing.

Pult. 46. 21 H. 6. 4. b. Moore 619. Noy 99.

Sect. 4. Alſo it hath been adjudged, That he ſhall not be puniſhed for Forgery who razeth out the Word *Libris* out of a Bond made to himſelf, and putteth in *Marcis*, becauſe here is no Appearance of a fraudulent Deſign to cheat another, and the Alteration is prejudicial to none but to him who makes it, whoſe Security for his Money is wholly avoided by it; yet it is ſaid, That it would be Forgery, if by the Circumſtances of the Caſe it ſhould any way appear to have been done with an Eye of gaining any Advantage to the Party himſelf, or of prejudicing a third Perſon: Alſo it is holden, That ſuch an Alteration, even without theſe Circumſtances is a Miſdemeanour, though it be no Forgery.

Noy 99. Salk. 375.

Sect. 5. It hath been reſolved, That a Man ſhall not be adjudged guilty of Forgery for writing a Will for another without any Directions from him, who becomes *Non Compos* before it is brought to him; for it is not the bare writing an Inſtrument in another's Name without his Privity, but the giving it a falſe Appearance of having been executed by him, which makes a Man guilty of Forgery.

Moore 760.

Sect. 6. It is ſaid, That regularly a Man cannot commit an Act of Forgery by a bare Nonfeaſance, as by omitting a Legacy out of a Will, which he is directed to draw for another; yet it hath been holden by one, even in this very Caſe, That if the Omiſſion of a Bequeſt to one cauſe a material Alteration in the Limitation of a Bequeſt to another, as where the Omiſſion of a Deviſe of an Eſtate for Life to one Man cauſeth a Deviſe

Moore 760. Noy 101.

Deviſe of the ſame Lands to another to paſs a preſent Eſtate, which otherwiſe would have paſſed a Remainder only, he who makes ſuch an Omiſſion is guilty of Forgery.

Sect. 7. It ſeemeth to be no way material, whether a forged Inſtrument be made in ſuch a Manner, That if it were in Truth ſuch as it is counterfeited for, it would be of Validity, or not; and upon this Ground it hath been adjudged, That the Forgery of a Protection in the Name of *A. B.* as being a Member of Parliament, who in Truth at the Time was not a Member, is as much a Crime as if he were.

[f] 1 Sid. 142.

And now I am to ſhew in the ſecond Place, That a Man may be guilty of Forgery at Common Law, in reſpect of any of the above mentioned Writings, and of no other.

Sect. 8. And firſt it is clear, That one may be guilty thereof by the Common Law, by counterfeiting a Matter of Record; for, ſince the Law gives the higheſt Credit to all Records, it cannot but be of the utmoſt ill Conſequence to the Publick, to have them either forged or falſified.

[i] 1 Rol. Ab. 65. Pl. 1, 2. 76 Pl. 3. Yelv. 146. Cro. El. 178. 3 Mod. 66.

Sect. 9. Secondly, Alſo there ſeemeth to be no Doubt, but that one may be guilty of this Crime by the Common Law, by forging any other authentick Matter of a publick Nature, as a [a] Privy Seal, or a [b] Licence from the Barons of the Exchequer to compound a Debt, or a [c] Certificate of Holy Orders, or a [d] Protection from a Parliament Man.

[a] 1 Rol. Ab. 68. Pl. 33. Cro. Ca. 326. 1 Jon. 325. [b] 1 Rol. Ab. 65. Pl. 5. 2 Bulſ. 137. [c] 1 Lev. 138. [d] 1 Sid. 142.

Sect. 10. Thirdly, It is alſo unqueſtionable, That a Man may be in like Manner guilty of Forgery at Common Law, by forging a [e] Deed, and ſurely there cannot be any Reaſon to doubt, but that one may be equally guilty by forging a [f] Will, which cannot be thought to be of leſs Conſequence than a Deed, but I do not find this Point any where directly holden.

[e] 1 Rol. Ab. 66. Pl. 10. Raymond 81. Owen 47. 1 Sid. 278. 3 Leon. 170. [f] Moore 760. Noy 101. Dy. 302. b.

Sect. 11. As to other Writings of an inferiour Nature, it ſeems to have been generally laid down as a [g] Rule, That the Counterfeiting of them is not properly Forgery; [h] and ſome have gone ſo far as to hold, That the Forging another's Hand, and thereby receiving Rent due to him from his Tenants, is not puniſhable at all; and therefore it cannot but be more ſafe to proceed againſt Offences of this Nature, as Cheats than as Forgeries; but ſurely it cannot be proved by any good Authority, That ſuch baſe Crimes are wholly diſregarded by the Common Law, as not deſerving a publick Proſecution; for the Opinion in the Books above cited, That they are puniſhable by no Law, ſeems by no Means to be maintainable, ſince many of them are moſt certainly puniſhable by Force of 33 *H.* 8. 1. which is ſet forth at large in the following Chapter; neither can it be a convincing Argument, That they are not puniſhable at Common Law, [i] becauſe they are of a private Nature; ſince Deeds concerning private Matters are alſo of a private Nature, as much as other Writings concerning ſuch Matters; yet no one will ſay, That the Making a falſe Deed concerning a private Matter is not puniſhable at Common Law; but perhaps it may be reaſonable to make this Diſtinction between the Counterfeiting of ſuch Writings, the Forgery whereof hath been already ſhewn to be properly puniſhable as Forgery, and the Counterfeiting of other Writings of an inferiour Nature, that the former is in it ſelf criminal, whether any third Perſon be actually injured thereby, or not, but that the latter is no Crime, unleſs ſome one receive a Prejudice from it.

[g] 1 Rol. Re. 431. 1 Sid. 16, 155, 451. 1 Rol. Ab. 66. Pl. 8, 9. Winch 40, 90. 3 Leon. 231. 1 Leon. 101. Cro. El. 296. 853. 3 Bulſ. 265. [h] Cro. El. 166. Yelv. 146. 3 Bulſ. 265. [i] Yelv. 146.

Sect. 12. Thus far of Forgery by the Common Law, and now I am to conſider Forgery by the Statute, which depends upon 5 *El.* 14. by which it is enacted, *That if any Perſon or Perſons upon his or their own Ha*

nd Imagination, or by falſe Conſpiracy and Fraud with others, ſhall wittingly, ubtilly, and falſly forge or make, or ſubtilly cauſe, or wittingly aſſent to be forged r made, any falſe Deed, Charter, or Writing ſealed, Court-Roll, or the Will of ny Perſon or Perſons in Writing, to the Intent that the State of Freehold or heritance of any Perſon or Perſons, of, in, or to any Lands, Tenements, or Hereditaments, Freehold or Copyhold, or the Right, Title, or Intereſt, of any erſon or Perſons, of, in, or to the ſame, or any of them, ſhall, or may be mo- See Pult. 45, *ſted, troubled, defeated, recovered or charged; or ſhall pronounce, publiſh, or* 46. *ew forth in Evidence, any ſuch falſe and forged Deed, Charter, Writing, Court-oll, or Will, as true, knowing the ſame to be falſe and forged, as is aforeſaid, the Intent above remembred, (except being an Attorney, Lawyer, or Counſel-r, he ſhall for his Client, plead, ſhew forth, or give in Evidence ſuch falſe and rged Deed, &c. to the forging whereof he was not Party nor Privy) and* Par. 15. *all be thereof convicted, either upon Action or Actions of Forgery of falſe eeds, to be founded upon the ſaid Statute, at the Suit of the Party grieved, or herwiſe, according to the Order and due Courſe of the Laws of this Realm, c. ſhall pay unto the Party grieved his double Coſts and Damages, to be found aſſeſſed in that Court where ſuch Conviction ſhall be, and alſo ſhall be ſet up-the Pillory in ſome open Market-Town, or other open Place, and there have th his Ears cut off, and alſo his Noſtrils ſlit and cut, and ſeared with a hot on, &c. and ſhall forfeit to the King the whole Iſſues and Profits of his ands and Tenements, and ſuffer perpetual Impriſonment, &c.*

Sect. 13. And it is farther enacted by the ſaid Statute, Par. 3. *That if y Perſon or Perſons, upon his or their own Head or Imagination, or by falſe nſpiration or Fraud had with any other, ſhall wittingly, ſubtilly, and falſly rge or make, or wittingly, ſubtilly and falſly cauſe or aſſent to be made and rged, any falſe Charter, Deed or Writing, to the Intent that any Perſon or Per-s ſhall or may have or claim any Eſtate or Intereſt for Term of Years, of, in, to any Manors, Lands, Tenements, or Hereditaments, not being Copyhold, or y Annuity in Fee-ſimple, Fee-tail, or for Term of Life, Lives or Years, or ll, as is aforeſaid, forge, make, or cauſe, or aſſent to be made or forged, any bligation, or Bill obligatory, or any Acquittance, Releaſe, or other Diſcharge of y Debt, Accompt, Action, Suit, Demand, or other Thing perſonal; or ſhall nounce, publiſh, or give in Evidence, (except as before excepted) any ſuch lſe or forged Charter, Deed, Writing, Obligation, Bill obligatory, Acquittance, leaſe, or Diſcharge, as true, knowing the ſame to be falſe and forged, and ſhall thereof convicted by any of the Ways and Means aforeſaid, he ſhall pay unto e Party grieved his double Coſts and Damages, to be found and aſſeſſed in ſuch* Lutw. 190. *urt where the ſaid Conviction ſhall be had, and ſhall be alſo ſet upon the Pil-y in ſome open Market-Town, or other open Place, and there have one of his ars cut off, and alſo ſhall ſuffer Impriſonment for one Year, &c.*

Sect. 14. And it is farther enacted by the ſame Statute, Par. 7 & 8. *hat if any Perſon or Perſons being convicted or condemned of any of the Of-nces aforeſaid by any the Ways or Means above limited, ſhall after any ſuch s or their Conviction or Condemnation, eftſoons commit or perpetrate any of e ſaid Offences in Form aforeſaid, that then every ſuch ſecond Offence ſhall adjudged Felony without Benefit of Clergy, ſaving to all Perſons other an the ſaid Offenders, and ſuch as Claim to their Uſes, all ſuch Rights, &c. hich they ſhall have to any the Hereditaments of any ſuch Perſon, ſo as is foreſaid convicted or attainted, at any Time before, &c. ſaving alſo the ower of ſuch Offender's Wife, and the Right of his Heir.*

Sect. 15. And it is farther enacted by the ſaid Statute, Par. 10. *That l Juſtices of Oyer and Terminer, and Juſtices of Aſſize, ſhall have Power inquire of, hear and determine the Offences aforeſaid.*

Sect. 16. But it is provided, Par. 9, 12 & 16. *That this Act or any Thing therein contained, ſhall not extend to any Ordinary, or his Commiſſary,* &c. *for putting their Seal of Office to any Will to be exhibited unto them, not knowing the ſame to be falſe or forged, or for Writing of the ſaid Will, or Probate of the ſame, nor to any Proctor,* &c. *of any Eccleſiaſtical Court, for the Writing, ſetting forth, or Pleading of any Proxy made according to the Eccleſiaſtical Law,* &c. *for the Appearance of any Perſon being cited to appear in ſuch Court; nor to any Archdeacon, or Official, for putting their authentick Seal to the ſaid Proxy or Proxies, nor to any Eccleſiaſtical Judge for admitting the ſame; nor to any Perſon who ſhall plead or ſhew forth any Deed or Writing exemplified under the great Seal of* England, *or under the Seal of any other authentick Court of this Realm; nor to any Perſon who ſhall cauſe any Seal of any Court to be ſet to any ſuch Deed, Charter, or Writing enrolled, not knowing the ſame to be falſe or forged.*

1 H. H. P. C. 682 to 687. In the Conſtruction of this Statute, the following Points have been holden,

Sect. 17. I. That a falſe Cuſtomary of a Copyhold Manor, made in Parchment under the Seals of ſeveral Tenants of the Manor, and containing in it divers falſe Cuſtoms, apparently tending to the Diſheriſon of the Lord, and falſly pretending by its Title to be ſet forth by the Conſent of all the Tenants, and Allowance of the Lord, is within the firſt Branch of Forgery mentioned in the Statute, as being a ſealed Writing made to the Intent to moleſt the Inheritance of the Lord.

Dy. 322. Pl. 26. 3 Leon. 108.

Sect. 18. II. That the Forgery of a Leaſe for Years, or of a Grant of a Rent-Charge for Years, in the Name of one who is ſeized of a Freehold or Inheritance, is alſo within the ſaid firſt Branch of the Statute, becauſe the ſaid Branch is penned in general Words extending to any Moleſtation whatſoever of ſuch Eſtate, without mentioning any Eſtate or Intereſt, in the Claim whereof ſuch Moleſtation ſhall conſiſt; and from this Ground it follows, That thoſe Words in the ſecond Branch of Forgery mentioned in the Statute, *to the Intent that any Perſon ſhall claim any Eſtate or Intereſt for Term of Years,* &c. are meant only of ſuch Forgeries which relate to ſuch an Eſtate or Intereſt *in eſſe* before.

3 Inſt. 170. Noy 42.

3 Inſt. 170. Noy 42.

Sect. 19. III. That the Forgery of a Will in Writing of one poſſeſſed of ſuch an Eſtate, mentioning a Bequeſt thereof, is within the ſaid ſecond Branch of the Statute, as being a falſe Writing, made to the Intent that ſome Perſon may claim an Eſtate for Years; notwithſtanding the ſaid Branch makes no expreſs Mention of a Will, as the firſt doth.

Dy. 302. Pl. 45.

3 Leon. 170. *Sect.* 20. IV. That the Forgery of a Leaſe of Lands in *Ireland* is not within either of the Branches of the Statute.

Sect. 21. V. That the Forgery of a Deed containing a Gift of mere perſonal Chattels, is alſo no way within the Statute, the Words whereof to this Purpoſe are, *If any Perſon ſhall forge any Obligation or Bill Obligatory, or any Acquittance, Releaſe, or other Diſcharge of any Debt, Account, Action, Suit, Demand, or other Thing perſonal.*

3 Leon. 170.

Sect. 22. VI. That the Forgery of a Statute-Merchant, or of a Recognizance in the Nature of a Statute-Staple, by acknowledging them in the Name of another are within the Statute, as being Obligations, becauſe they muſt have the Seal of the Party, by the expreſs Words of the Statute which appoint in what Manner ſuch Statute or Recognizance ſhall be taken. But that the Forgery of the Statute-Staple is no way within the Statute, becauſe it needeth not the Seal of the Party, but only the Seal of the Staple provided for it.

See Ch. 42, & 62. 15 H. 7. 15. a. 2 Rol. A. 466. Pl. 2, 3, 4, 5. Con. 3 Inſt. 171.

Sect. 23. VII. That he who is truly informed by another, that a Deed s forged, is in danger of the Statute if he afterwards publiſh the ſame to e true; notwithſtanding the Words of the Statute be, *If any one ſhall ublish*, &c. *ſuch falſe and forged Deed*, &c. *knowing the ſame to be falſe r forged.* 3 Inſt. 171.

Sect. 24. VIII. That the double Damages to be awarded to the Party rieved by a forged Releaſe of an Obligation, *&c.* ſhall be governed by the enalty, and not by the true Debt appearing in the Condition. 3 Inſt. 172.

Sect. 25. IX. That one who hath been convicted of publiſhing a forged eed, may become guilty of Felony by forging another Deed afterwards, s well as by publiſhing any ſuch Deed, notwithſtanding the ſecond Offence e not of the very ſame Nature with the firſt; for the Words of the Sta- te are, *If any Perſon being convicted or condemned of any of the Offences foreſaid*, &c. *ſhall, after any ſuch Conviction or Condemnation, eftſoons com- it any of the ſaid Offences.* 3 Inſt. 172.

Sect. 26. X. That notwithſtanding it be neceſſary in every Proſecution on the Statute ſtrictly to purſue the very Words of it, (for which Cauſe hath been reſolved, That an Indictment, ſetting forth the Forgery of a Writing indented, without adding, that it was ſealed, is inſufficient;) yet ere is no Neceſſity that the Tranſlation of ſuch Words be made in proper aſſical *Latin*, ſo that it be intelligible; and upon this Ground it hath en adjudged, That an Indictment, ſetting forth that the Defendant *ſuper ut ſuum proprium* did forge, *&c.* meaning thereby to expreſs that he did of his own Head, is ſufficient. 3 Keb. 356, 367. 3 Inſt. 169. See 1 Keb. 849. 2 Keb. 129. 2 Levin. 221. Other Caſes of this Kind, 2 Keb. 129, 245, 501, 532. Far. 150.

Sect. 27. XI. That upon an Indictment of Treſpaſs, Forgery and Pub- ation of a Deed, a Verdict finding the Defendant guilty *de Tranſgreſſione Forgeria prædictis prout ſuperius in Indictamento ſupponitur*, is ſufficient, cauſe thoſe Words *de Tranſgreſſione prædict'* include the whole: Alſo per- ps ſuch a Verdict may be ſufficient for another Reaſon, becauſe the Of- nce is equally within the Statute, and the Puniſhment the very ſame, hether the Party be guilty both of the Forgery and Publication, or of one them only. 1 Vent. 23, 24. Salk. 342, 375. Pl. 18. 2 Levin. 111, 221. 3 Keb. 353.

e the Additions [85] [86] *for the late Acts againſt Forgery*, & ſupra Ch. 58.

CHAP. LXXI.

Of Cheats.

OF Cheats puniſhable by publick Proſecution, there are two Kinds,

1. By the Common Law.
2. By Statute.

Sect. 1. And firſt it ſeemeth, That thoſe which are puniſhable at ommon Law, may in general be deſcribed to be deceitful Practices, in frauding or endeavouring to defraud another of his known Right by eans of ſome artful Device, contrary to the plain Rules of common onеſty; as by [a] Playing with falſe Dice; or by [b] cauſing an illiterate rſon to execute a Deed to his Prejudice, by reading it over to him in Words

[a] 2 Rol. Re. 107. Cro. Ja. 497, 498. 2 Rol. Ab. 78. H. 1, 2. 1 Keb. 849. Par. Caſe 6. Mod. 42. Far. 40.

[b] 1 Sid. 312.

Words different from thoſe in which it was written; or by [a] perſwading a Woman to execute Writings to another, as her Truſtee upon an intended Marriage, which in Truth contained no ſuch Thing, but only a Warrant of Attorney to confeſs a Judgment, *&c.* or by [b] ſuppreſſing a Will, or by [c] levying a Fine in another's Name, or [d] ſuing out an Execution upon a Judgment for him, or acknowledging an Action in his Name without his Privity, and againſt his Will; in which Caſes, by ſome good [e] Opinions, the Record may be vacated.

[a] 1 Sid. 431.
[b] Noy 103.
[c] Noy 99. Moor 630. Cro. El. 531. 1 Mod. 46. 2 Jon. 64.
[d] Noy 99.
[e] See the Books above cited, but 2 Rol. A. 863. C. & 12 Co. 123, are contrary.

Sect. 2. It [f] ſeemeth to be the better Opinion, That the deceitful receiving of Money from one Man to another's Uſe, upon a falſe Pretence of having a Meſſage and Order to that Purpoſe, is not puniſhable by a criminal Proſecution, becauſe it is accompanied with no manner of artful Contrivance, but wholly depends on a bare naked Lie; and it is ſaid to be needleſs to provide ſevere Laws for ſuch Miſchiefs, againſt which common Prudence and Caution may be a ſufficient Security.

[f] 6 Mod. 105. Salk. 379. 5 Mod. 18.

Sect. 3. Some of the above mentioned Offences are puniſhable, not only with Fine and Impriſonment, but alſo with farther infamous Puniſhment, (as cheating with falſe Dice, eſpecially if the Offender be a common Gameſter) others are puniſhable with Fine and Impriſonment only, by the Diſcretion of the Judges, which is regulated by the Circumſtances of each particular Caſe; and ſome of them are made Felonies by 21 *Jac.* 1. 26. as appeareth from Chapter 45.

See the Authorities cited in Sect. 1.

Sect. 4. Offences of this Kind by Statute depend upon 33 *H.* 8. 1. by which it is enacted, *That if any Perſon or Perſons ſhall falſly and deceitfully obtain or get into his or their Hands or Poſſeſſion, any Money, Goods, Chattels, Jewels, or other Things of any other Perſon or Perſons, by Colour and Means of any privy falſe Token, or counterfeit Letter made in another Man's Name, to a ſpecial Friend or Acquaintance, for the obtaining of Money, &c. from ſuch Perſon, and ſhall be thereof convicted, by Witneſs taken before the Lord Chancellor, or before the Juſtices of Aſſize, or before the Juſtices of Peace of any County, City, Borough, Town, or Franchiſe in their general Seſſions, or by Action in any of the King's Courts of Record, every ſuch Offender ſhall ſuffer ſuch Puniſhment by Impriſonment, ſetting upon the Pillory, or otherwiſe by any corporal Pain, except Pains of Death, as ſhall be appointed by thoſe before whom he ſhall be ſo convict.*

1 H. H. P. C. 506.

Sect. 5. And it is farther enacted by the ſaid Statute, *That as well the Juſtices of Aſſize for the Time being, as alſo two Juſtices of Peace in the ſame County, whereof the one to be of the* Quorum, *may call and convene by Proceſs, or otherwiſe, to the ſaid Aſſizes, or general Seſſions, any Perſon being ſuſpected of any of the Offences aforeſaid, and to commit or bail him till the next Aſſizes or general Seſſions,* &c.

Sect. 6. Sir *Edward Coke* is of Opinion, That the Offender cannot be fined in a Proſecution upon this Statute, becauſe it is expreſly ordained That ſome corporal Puniſhment ſhall be inflicted, and no other is mentioned; however, there is a Precedent in *Croke*'s Reports, by which it appears, That one convicted on ſuch a Proſecution hath been adjudged not only to ſtand on the Pillory, but alſo to pay a Fine of five hundred Pounds and to be bound with good Sureties to his good Behaviour.

3 Inſt. 123.

Cro. Ca. 564.

CHAP. LXXII.

Of Conſpiracy.

FOR the better Underſtanding of the Nature of Conſpiracy, I ſhall conſider the following Particulars:

1. Who may be ſaid to be guilty of it.
2. In what Manner ſuch Offenders are to be puniſhed.

Sect. 1. As to the firſt Point, there can be no better Rule than the Sta- 2 Inſt. 562.
te of 33, or rather 21 *Ed.* 1. the Intent whereof was to make a final De-
nition of Conſpirators, to which Purpoſe it declareth, *That Conſpirators*
they that do conſeder or bind themſelves by Oath, Covenant or other Alli-
ce, that every of them ſhall aid and bear the other falſly and maliciouſly
indict, or cauſe to indict, or falſly to move and maintain Pleas, and alſo
h as cauſe Children within Age to appeal Men of Felony, whereby they are
priſoned and ſore grieved; and ſuch as retain Men in the Country with
veries or Fees for to maintain their malicious Enterprizes; and this ex-
deth as well to the Takers as to the Givers. And Stewards and Bailiffs
great Lords, who by their Seigniory, Office, or Power, undertake to bear
maintain Quarrels, Pleas, or Debates that concern other Parties than ſuch
touch the Eſtate of their Lords or themſelves.

Sect. 2. From this Definition of Conſpirators it ſeems clearly to fol-
w, That not only thoſe who actually cauſe an Innocent Man to be in-
ted, and alſo to be tried upon the Indictment, whereupon he is law-
ly acquitted, are properly Conſpirators, but that thoſe alſo are guilty
this Offence, who barely conſpire to indict a Man falſly and mali-
uſly, whether they do any Act in Proſecution of ſuch Conſpiracy or
t; for the Words of the Statute ſeem expreſly to include all ſuch Con-
eracies under the Notion of Conſpiracy, whether there be any Proſecu-
n thereof or not; and if ſuch a Confederacy be within the Letter of
e Statute, there ſeems to be no Manner of Reaſon to ſay, That they are
t alſo within the Meaning of it, ſince it is a high Contempt of the
w, barely to engage in ſuch an Aſſociation to abuſe it, to ſerve the
rpoſes of Oppreſſion and Injuſtice; neither can it be a ſevere Conſtruc-
n which will bring a Crime ſo evidently contrary to the firſt Princi-
s of common Honeſty, within the Meaning of a Law, the Words
ereof do plainly ſeem to extend to it. And therefore I cannot but
eſtion the Accuracy of that Deſcription of Conſpiracy which is given
the third *Inſtitute*, whereby the lawful Acquittal of the Party grieved
required to make the Offenders guilty of this Crime. It is true indeed, 3 Inſt. 143.
at a bare Conſpiracy to indict a Man will not maintain a Writ of
nſpiracy at the Suit of the Party grieved, becauſe it doth not do him F. N. B.
actual Damage; alſo it muſt be confeſſed, That it is often laid down 114. D.
a general Rule, and taken for granted, That no ſuch Conſpiracy is a 1 Danv. Abr.
d Foundation for ſuch a Writ, unleſs the Plaintiff be lawfully ac- 211. 2.
tted; and it is certain, That there is no formed Writ of Conſpiracy in 213. 1, 2.
Regiſter for a malicious Indictment or Appeal; but what ſuppoſes ſuch S.P.C. 173. A.
174. B. D.
175. A.
Bro. Coro.
80, or 89.

Appeal 68. 1 Rol. Ab. 110. Pl. 2. 111. Pl. 5. 114. Pl. 3. 9 Co. 56, 57. Regiſt. 134. 1 Jon. 93, 94.

Indictment or Appeal to have been actually brought, and the Party to have been legally diſcharged; from whence it follows, That no one can have the Benefit of any ſuch Writ in the Regiſter, who upon a falſe Accuſation, is put to the Trouble and Vexation of being apprehended, examined, or committed, *&c.* without being ever indicted or appealed. However it is certain, That an Acquittal by Verdict is not always neceſſary to maintain ſuch a Writ, for it appears by the Regiſter it ſelf, That where one brought ſuch a Writ in the uſual Form, having it in the Words *quouſque acquietatus fuiſſet*, *&c.* againſt one who had been nonſuited in a malicious Appeal of Felony brought againſt him, his Writ was abated, becauſe ſuch a Nonſuit would not make good the Words *quouſque acquietatus fuiſſet*, and yet he afterwards brought a new Writ, wherein he uſed the Words *quietus receſſit*, inſtead of *acquietatus fuiſſet*, and recovered. And why may not a new Writ as well be formed in any other Caſe, which is as much within the Miſchief of the Statute as this? Or what Colour can there be to ſay, That the malicious putting of a Man to the unreaſonable Charge, Scandal, and Trouble, of a criminal Proſecution, which is ſo palpably groundleſs, as not to have Probability enough to induce a Grand Jury to find an Indictment, ſhould not be as good a Foundation of Complaint, and a Grievance as much within the Meaning of the Statute, as the putting one to the Charge and Vexation of a groundleſs Action, either in a Temporal or Spiritual Court, for which it appears by the [a] Regiſter, That a Writ of Conſpiracy doth lie without making uſe either of the Words *acquietatus fuiſſet*, or *quietus receſſit?* Neither can it be ſaid, That the Opinion I contend for is wholly unſupported by Authority, as appears from the *Poulterer*'s Caſe in [b] *Coke*'s ninth Report. However ſince it is certain, That an [c] Action on the Caſe in the Nature of ſuch Writ doth lie for a falſe and malicious Proſecution, for any Crime, whether capital, or not capital, tho' it doth not proceed to an actual Indictment, or Appeal, and that the ſame Damages may be recovered in ſuch Action, as in a Writ of Conſpiracy, it hath been thought needleſs to inquire, whether ſuch Writ may be maintained for ſuch a Proſecution, or not. But howſoever the Law may ſtand in Relation to Writs of Conſpiracy, there ſeems to be no manner of Reaſon that the ſtated Form of ſuch Writs ſhould any Way reſtrain a Proceeding by way of Indictment or Information againſt Perſons which are apparently within both the Letter and Meaning of the Statute. Alſo it ſeems certain, That a Man may not only be condemned to the Pillory, but alſo to be branded for a falſe and malicious Accuſation, but ſince it doth not appear to have been ſolemnly reſolved that ſuch an Offender is indictable upon the Statute, it ſeems to be more ſafe and adviſable to ground an Indictment of this Kind upon the Common Law, than upon the Statute, ſince there can be no Doubt, but that all Confederacies whatſoever, wrongfully to prejudice a third Perſon, are highly criminal at Common Law, as where divers Perſons confederate [d] together by indirect Means to impoveriſh a third Perſon, or [e] falſly and maliciouſly to charge a Man with being the reputed Father of [f] a Baſtard Child, or to maintain one another in any Matter, whether it be true or falſe

Bro. Coro. 6, or 8. 33 H. 6. 1. Regiſt. 134. b. See S. P. C. 174. D. Vide 2 Inſt. 407, 562.

[a] Regiſt. 134. F.N.B. 116. B. Finch 306. 2 Inſt. 562. 1 Keb. 254.

[b] 9 Co. 56. b.

[c] 1 Jon. 93, 94. 1 Leon. 107. Cro. El. 70, 134. Palm. 315. Cro. Ja. 130, 357. Latch 79. Cro. Ca. 15. 2 Rol. Re. 236, 237. 2 Bulſt. 270, 271. 1 Rol. Re. 109. 1 Rol. A. 112. Pl. 11, 12, 13. 113. Pl. 14. 213. Pl. 3. Ray. 135, 180. Con. 1 Bulſt. 185. Yelv. 116. Hutt. 49. Cro. El. 563. 9 Co. 57. a.

[d] 1 Levin. 62, 126. 1 Sid. 174. 1 Keb. 350.

[e] 1 Levin. 62. 1 Mod. 185, 186. 1 Sid. 68. 1 Keb. 254.

[f] 27 Aſſ. 44. 9 Co. 56. b. 2 Rol. Ab. 77. Pl. 2, 3. See Moor 788. Salk. 174. 1 Vent. 303, 304. 6 Mod. 185.

Sect. 3. Neither doth it ſeem to be any Juſtification of a Conſpiracy to carry on a falſe and malicious Proſecution, That the Indictment or Appeal, which was preferred, or intended to be preferred, in Purſuance

f it, was [a] Inſufficient, or that the Court wherein the Proſecution was car-
ed on, or deſigned to be carried on, had no Juriſdiction of the Cauſe, or
hat the Matter of the Indictment did import no Manner of [b] Scandal, ſo
hat the Party grieved was in Truth in no Danger of loſing either his Life,
Liberty, or Reputation; for notwithſtanding the Injury intended to the
arty againſt whom ſuch a Confederacy is formed, may perhaps be incon-
derable; yet the Aſſociation to pervert the Law in order to procure it,
eems to be a Crime of a very high Nature, and juſtly to deſerve the Re-
ntment of the Law.

[a] Palm. 45. 3 Keb. 141. Stile 157. 1 Rol. Ab. 110. Pl. 2. 1 Rol. Ab. 111. Pl. 7. 9 Co. 26. b. Yelv. 46, 117. Cro. El. 563. 2 Bulſt. 270, 271. Cro. Ja. 357. 1 Rol. Ab. 112.

[b] Regiſt. 134. F. N. B. 116. F. 3 Aſſ. Pl. 13. 11 H. 7. 25. b. 26. a. 1 Rol. Rep. 109. 10. 2 Mod. 52, 306. Con. 2 Keb. 881.

Sect. 4. Neither [c] is it any Plea for one who is proſecuted for ſuch an
nlawful Confederacy, That nothing more was intended by him, but only
give his Teſtimony in a legal Courſe of Juſtice againſt the Party to
hoſe Prejudice ſuch Confederacy is ſuppoſed to have been formed; for
otwithſtanding it may be ſaid, That it would be a great Diſcouragement
legal Proceedings to make Perſons liable to a criminal Proſecution, for
rely intending to give their Evidence, and it would be a Pre-judging of a
auſe to try the Truth of the Teſtimony intended to be given in it before
e Cauſe it ſelf is determined; yet the Law will rather venture this Miſ-
hief, than ſuffer ſo flagrant a Villany to go unpuniſhed. However if there
any Probability, That the principal Cauſe will ever be tried, it ſeems
roper to apply to the Court to ſtay the Trial of the Confederacy till the
lerits of the principal Cauſe be determined.

[c] 9 Co. 55. b. 56, 57. 12 Co. 23, 90, 91, 92. Cro. El. 70, 71, 134. 1 Leon. 107. 1 Rol. Ab. 113. Pl. 5. 114. Pl. 4, 5. 115. Pl. 7. Winch 28, 54. Latch 79, 80. Con. 1 Rol. Ab. 110. Pl. 1. F. N. B. 115. E. 27 H. 8. 2. a. b.

Sect. 5. Yet it [d] ſeems to be certain, That no one is liable to any Pro-
cution whatſoever, in reſpect of any Verdict given by him in a criminal
latter, either upon a Grand or Petit Jury; for ſince the Safety of the In-
ocent, and Puniſhment of the Guilty, doth ſo much depend upon the
ir and upright Proceeding of Jurors, it is of the utmoſt Conſequence,
hat they ſhould be as little as poſſible under the Influence of any Paſſion
hatſoever. And therefore, leſt they ſhould be biaſſed with the Fear of be-
g harraſſed by a vexatious Suit, for acting according to their Conſciences,
he Danger of which might eaſily be inſinuated, where powerful Men
e warmly engaged in a Cauſe and throughly prepoſſeſſed of the Juſtice
f the Side which they eſpouſe) the Law will not leave any Poſſibility
r a Proſecution of this Kind. It is true indeed, the Jurors were for-
erly ſometimes queſtioned in the Star-Chamber, for their Partiality in
nding a manifeſt Offender not guilty; but this was always thought
very great Grievance; and ſurely as the Law is now ſettled by *Buſhel*'s
aſe, there is no Kind of Proceeding againſt Jurors in reſpect of their Ver-
cts in criminal Matters allowed of at this Day. As to the Objection,
hat an Attaint lies againſt a Jury for a falſe Verdict in a civil Cauſe, and
at there is as much Reaſon to allow of it in a criminal one; it may be
nſwered, That in an Attaint, a Man's Property only is brought into Que-
ion a ſecond Time, and not his Liberty or Life; and alſo it may be ge-
erally preſumed, That a Jury is likely to be equally influenced with the
ear of an Attaint from either of the contending Parties, whereas if any
ch Examinations of their Proceedings were allowed in criminal Cauſes,
ey might be often in great Danger of one Side, by incurring the Reſent-
ent of a powerful Proſecutor, and provoking him to call their Conduct
to Queſtion for their ſuppoſed Partiality; but they could have little to
ar from an injured Criminal, who would ſeldom be in Circumſtances to
ake his Proſecution formidable.

[d] 22 Aſſ. 77. 27 Aſſ. 12. 9 H. 6. 44. b. Bridgm. 130, 131. 21 E. 3. 17. a. 47 E. 3. 17. a. 12 Co. 23, 24. Regiſt. 134. F. N. B. 115. C. D. 27 H. 8. 2. S. P. C. 172, 173. 12 Co. 23, 24. Vaugh. 135. F. N. B. 105, 106.

Sect. 6.

12 Co. 24. See Vaughan 138, 139. 12 Ed. 4. 18. 21 Ed. 4. 67. a. S. P. C. 173.

Sect. 6. And as the Law has exempted Jurors from the Danger of incurring any Puniſhment in reſpect of their Verdicts in criminal Cauſes, it hath alſo freed the Judges of all Courts of Record from all Proſecutions whatſoever, except in the Parliament, for any Thing done by them openly in ſuch Courts as Judges. For the Authority of a Government cannot be maintained, unleſs the greateſt Credit be given to thoſe who are ſo highly intruſted with the Adminiſtration of Publick Juſtice; and it would be impoſſible for them to keep up in the People that Veneration of their Perſons and Submiſſion to their Judgments, without which it is impoſſible to execute the Laws with Vigour and Succeſs, if they ſhould be continually expoſed to the Proſecutions of thoſe whoſe Partiality to their own Cauſes 12 Co. 24. would induce them to think themſelves injured. Yet if a Judge will ſo far forget the Dignity and Honour of his Poſt, as to turn Solicitor in a Cauſe which he is to judge, and privately and extrajudicially tamper with Witneſſes, or labour Jurors, he hath no Reaſon to complain, if he be dealt with according to the ſame Capacity, to which he ſo baſely degrades himſelf.

1 Rol. Ab. 111. Pl. 6. 112. Pl. 8. 115. Pl. 7. Bro. Coro. 89. S. P. C. 173. 22 Aſſ. 77. 1 Leon. 107. Cro. El. 134. Kelw. 81. b. 83. b. 20 H. 7. 11. 20 H. 7. 11. Kellw. 81. b. Cro. El. 134. 1 Leon. 107.

Sect. 7. It appears not only from the Words of the Statute, but alſo from the plain Reaſon of the Thing, That no Confederacy whatſoever to maintain a Suit can come within the Danger of the Statute, unleſs it be both falſe and malicious; for it would be a moſt dangerous Diſcouragement of all legal Proſecutions, if thoſe who engage in them upon a probable Ground, ſhould be in Danger of being found guilty of ſo heinous a Crime upon their not being able to bring their Suits to their intended Effect; and from hence it clearly follows, that if the Defendants to an Indictment or Appeal in Murder be fgund guilty of Homicide *ſe defendendo*, or by Miſadventure, or get off by pleading the King's Pardon, their Proſecutors are in no Danger of being puniſhed as Conſpirators: And from the ſame Ground it alſo follows, That if the Defendants in a Writ of Conſpiracy can ſhew a probable Cauſe of Suſpicion, they ſhall be diſcharged; as where being accuſed of a Conſpiracy for indicting a Perſon of Larceny, they can ſhew that a Larceny was committed at ſuch a Time and Place, and that the Party charged by them for ſuch Larceny was found by them at the ſame Time and Place, with ſuſpicious Circumſtances; or where Perſons being charged with a Conſpiracy for indicting another for feloniouſly carrying away a Woman, with great Violence and Numbers, are able to prove that they ſaw the Perſons whom they ſo accuſed riding armed in a warlike Manner, and following after thoſe who in Truth actually did the Felony, and that it was the common Report of the Country that they were all of the Company. But ſome have ſaid, That there is a Neceſſity to plead ſuch Matter ſpecially, and that it cannot be given in Evidence on the General Iſſue.

[a] 8 H. 4. 6. b. 28 Aſſ. Pl. 12. S. P. C. 173. C. D. E. 174. A. Cro. El. 701. 5 Mod. 222, 223. 1 Rol. A. 111. Pl. 5. 112.

Sect. 8. It plainly appears from the Words of the Statute, That one Perſon alone cannot be guilty of Conſpiracy within the Purport of it; from whence it follows, That if all the Defendants who are proſecuted for ſuch a Conſpiracy be acquitted but one, the [a] Acquittal of the reſt is the Acquittal of that one alſo; alſo upon the ſame Ground it hath been holden, That no ſuch Proſecution is maintainable againſt a [b] Huſband and Wife only, becauſe they are eſteemed but as one Perſon in Law, and are preſumed to have but one Will. But it is certain, That an Action on the [c] Caſe in the Nature of a Conſpiracy may be brought againſt one only: Alſo [d] it hath been reſolved, That if ſuch an Action be brought

[b] 38 Ed. 3. 3. a. b. S. P. C. 174. a. [c] 1 Rol Ab. 111. Pl. 5. 112. Pl. 9. F. N. B. 116. Cro. Ja. 194. Pl. 9. Cro. Ca. 239. 3 Mod. 220. [d] 1 Rol. Ab. 111. Pl. 5. 112. Pl. 9. Cro. El. 701. 6 Mod. 170. 1 Saund. 228. Raymond 180. 2 Keb. 497.

inſt ſeveral Perſons, and all but one be acquitted, yet Judgment may be ven againſt that one only.

Sect. 9. As to the ſecond Point, *viz.* In what manner Offenders of is Nature are to be puniſhed, it is clear, That thoſe who are convicted Conſpiracy at the Suit of the [a] Party ſhall only have Judgment of Fine d Impriſonment, and to render to the Plaintiff his Damages. Alſo it is rtain, That he who is convicted at the Suit of the [b] King, of a Conſpi- cy to accuſe another of a Matter which may touch his Life, ſhall have dgment that he ſhall loſe the Freedom and Franchiſe of the Law, (where- he is diſabled to be put upon any Jury, or to be ſworn as a Witneſs, even to appear in Perſon in any of the King's Courts;) and alſo that his ouſes, Lands, and Goods, ſhall be ſeiſed into the King's Hands, and his ouſes and Lands eſtreped and waſted, his Trees rooted up and arraſed, d his Body impriſoned. And this is commonly called a villainous Judg- ent, and is given by the Common Law, and not by any Statute, and is d generally in ſome [c] Books, to be the proper Judgment upon every Con- ction of Conſpiracy, at the Suit of the King, without any Reſtriction to ch as endangered the Life of the Party; but I do not find this Point any here ſettled.

[a] 24 Ed. 3. 34. b. 3 Inſt. 143. 2 Inſt. 383, 562. S. P. C. 175.

[b] 24 Ed. 3. 34. b. 3 Inſt. 143. 2 Inſt. 562. S. P. C. 175. 27 Aſſ. Pl. 59.

[c] See the Books above cited. 27 Aſſ. Pl. 59. S. P. C. 175.

CHAP. LXXIII.

Of Libels.

N treating of Libels, I ſhall conſider,

1. What ſhall be ſaid to be a Libel.
2. Who are liable to be puniſhed for it.
3. In what Manner they are to be puniſhed.

Sect. 1. As to the firſt Point it ſeemeth, That a Libel in a ſtrict Senſe is ken for a malicious Defamation, expreſſed either in Printing or Writing, d tending either to blacken the Memory of one who is dead, or the Re- tation of one who is alive, and to expoſe him to publick Hatred, Con- mpt or Ridicule.

5 Co. 121. 5 Mod. 165, 166.

Sect. 2. But it is ſaid, That in a larger Senſe the Notion of a Libel may applied to any Defamation whatſoever, expreſſed either by Signs or Pic- res, as by fixing up a Gallows againſt a Man's Door, or by painting m in a ſhameful and ignominious Manner.

5 Co. 121. b. Skin. 123, 124.

Sect. 3. And ſince the chief Cauſe for which the Law ſo ſeverely pu- ſhes all Offences of this Nature, is the direct Tendency of them to a each of Publick Peace, by provoking the Parties injured, and their Friends d Families to Acts of Revenge, which it would be impoſſible to reſtrain the ſevereſt Laws, were there no Redreſs from Publick Juſtice for juries of this kind, which of all others are moſt ſenſibly felt; and ſince e plain Meaning of ſuch Scandal as is expreſſed by Signs or Pictures, is obvious to common Senſe, and as eaſily underſtood by every common apacity, and altogether as provoking, as that which is expreſſed by Wri- ng or Printing, why ſhould it not be equally criminal?

5 Co. 121.

Sect. 4. And from the ſame Ground it ſeemeth clearly to follow, hat ſuch Scandal as is expreſſed in a ſcoffing and ironical Manner,

Hob. 215. Poph. 139.

makes a Writing as properly a Libel, as that which is expreſſed in direct Terms; as where a Writing in a taunting Manner reckoning up ſeveral Acts of Publick Charity done by one, ſays, *You will not play the Jew, nor the Hypocrite*, and ſo goes on in a Strain of Ridicule to inſinuate, that what he did was owing to his Vain-Glory; or where a Writing, pretending to recommend to one the Charracters of ſeveral great Men for his Imitation, inſtead of taking Notice of what they are generally eſteemed famous for, pitched on ſuch Qualities only which their Enemies charge them with the Want of; as by propoſing ſuch a one to be imitated for his Courage who is known to be a great Stateſman, but no Soldier, and another to be imitated for his Learning, who is known to be a great General, but no Scholar, *&c.* which Kind of Writing is as well underſtood to mean only to upbraid the Parties with the Want of theſe Qualities, as if it had directly and expreſly done ſo.

Brown's Caſe.

Sect. 5. And from the ſame Foundation it hath alſo been reſolved, That a Defamatory Writing expreſſing only one or two Letters of a Name, in ſuch a Manner, that from what goes before and follows after, it muſt needs be underſtood to ſignify ſuch a particular Perſon, in the plain, obvious and natural Conſtruction of the whole, and would be perfect Nonſenſe if ſtrained to any other Meaning, is as properly a Libel, as if it had expreſſed the whole Name at large; for it brings the utmoſt Contempt upon the Law, to ſuffer its Juſtice to be eluded by ſuch trifling Evaſions: And it is a ridiculous Abſurdity to ſay, That a Writing which is underſtood by every the meaneſt Capacity, cannot poſſibly be underſtood by a Judge and Jury.

Hurt's Caſe, Trin. 12 Annæ.

5 Co. 125. b. Hob. 253. Moore 627.

Sect. 6. And from the ſame Ground it farther doth appear, That it is far from being a Juſtification of a Libel, that the Contents thereof are true, or that the Perſon upon whom it is made, had a bad Reputation, ſince the greater Appearance there is of Truth in any malicious Invective, ſo much the more provoking it is.

5 Co. 125.

Sect. 7. Nor can there be any Doubt, but that a Writing which defames private Perſons only, is as much a Libel as that which defames Perſons intruſted with a Publick Capacity, inaſmuch as it manifeſtly tends to create ill Blood, and to cauſe a Diſturbance of the Publick Peace: However it is certain, That it is a very high Aggravation of a Libel that it tends to ſcandalize the Government, by reflecting on thoſe who are intruſted with the Adminiſtration of Publick Affairs, which doth not only endanger the Publick Peace, as all other Libels do, by ſtirring up the Parties immediately concerned in it to acts of Revenge, but alſo has a direct Tendency to breed in the People a Diſlike of their Governors, and incline them to Faction and Sedition.

2 Rol. Re. 86.

Sect. 8. But it hath been reſolved, That no falſe or ſcandalous Matter contained in a [a] Petition to a Committee of Parliament, or in [b] Articles of the Peace exhibited to Juſtices of Peace, or in any other [c] Proceeding in a regular Courſe of Juſtice, will make the Complaint amount to a Libel; for it would be a great Diſcouragement to Suitors to ſubject them to Publick Proſecutions, in reſpect of their Applications to a Court of Juſtice. And the chief Intention of the Law in prohibiting Perſons to revenge themſelves by Libels, or any other private Manner, is to reſtrain them from endeavouring to make themſelves their own Judges, and to oblige them to refer the Deciſion of their Grievances, to thoſe whom the Law has appointed to determine them. Alſo [d] it ſeemeth to have been holden by ſome, That no Want of Juriſdiction in the Court to which ſuch a Complaint ſhall be exhibited, will make it a Libel, be-

[a] 1 Lev. 240. 1 Sid. 414, 415. 1 Saund. 131. 2 Keb. 832.
[b] 4 Co. 14. b.
[c] Dyer 285. Pl. 37.
4 Burr. v. 2 p. 809.
[d] 2 Keb. 832. Con. 4 Co. 14. b.

cauſe the Miſtake of the proper Court is not imputable to the Party, but to his Counſel. Yet if it ſhall manifeſtly appear from the whole Circumſtances of the Caſe, That a Proſecution is intirely falſe, malicious, and groundleſs, and commenced, not with a Deſign to go through with it, but only to expoſe the Defendant's Character under the Shew of a legal Proceeding; I cannot ſee any Reaſon why ſuch a Mockery of Publick Juſtice ſhould not rather aggravate the Offence, than make it ceaſe to be one, and make ſuch Scandal a good Ground of an Indictment at the Suit of the King; as it makes the Malice of their Proceeding a good Foundation of an Action on the Caſe at the Suit of the Party, whether the Court had a Juriſdiction of the Cauſe or not. But it is ſaid, that no Preſentment of a Grand Jury can be a Libel, not only becauſe Perſons who are ſuppoſed to be returned without their own ſeeking, and are ſworn to act impartially, ſhall be preſumed to have proper Evidence for what they do, but alſo becauſe it would be of the utmoſt ill Conſequence any way to diſcourage them from making their Inquiries with that Freedom and Readineſs which the Publick Good requires. For which Conſiderations, it ſeems reaſonable to exempt them from the Fear of any Kind of Proſecution in reſpect of their Inquiries, as hath been ſhewn more at large in the Chapter of Conſpiracy.

See 1 Danv. Abr. 208, 209, 210, 211. and the foregoing Chapter of Conſpiracy.

Moore 627.

Sect. 9. However it ſeems clear, That no Writing whatſoever is to be eſteemed a Libel, unleſs it reflect upon ſome particular Perſon; and it ſeems, That a Writing full of obſcene Ribaldry, without any Kind of Reflection upon any one, is not puniſhable at all by any Proſecution at Common Law, as I have heard it agreed in the Court of King's Bench; yet it ſeems, That the Author may be bound to his good Behaviour, as a ſcandalous Perſon of evil Fame.

Fortesc. 29. q. v. Str. 708 and 5

See the Chapter concerning Surety for the good Behaviour.

Sect. 10. As to the ſecond Point, *viz.* Who are liable to be puniſhed for a Libel, it is certain that not only he who compoſes, or procures another to compoſe it, but alſo that he who publiſhes, or procures another to publiſh it, are in Danger of being puniſhed for it; and it is ſaid, not to be material whether he who diſperſes a Libel knew any Thing of the Contents or Effect of it or not; for nothing could be more eaſy than to publiſh the moſt virulent Papers with the greateſt Security, if the Concealing the Purport of them from an illiterate Publiſher would make him ſafe in diſperſing them. Alſo it hath been ſaid, That if he who hath either read a Libel himſelf, or hath heard it read by another, do afterwards maliciouſly read or repeat any Part of it, in the Preſence of others, or lend or ſhew it to another, he is guilty of an unlawful Publication of it. Alſo it hath been holden, That the Copying of a Libel ſhall be a concluſive Evidence of the Publication of it, unleſs the Party can prove that he delivered it to a Magiſtrate to examine it, in which Caſe the Act ſubſequent is ſaid to explain the Intention precedent. But it ſeems to be the better Opinion, That he who firſt writes a Libel dictated by another, is thereby guilty of making it, and conſequently puniſhable for the bare Writing; for it was no Libel till it was reduced to Writing.

9 Co. 59. b. Moore 627, 813. Moore 627. Con. 9 Co. b. 59. b. Moore 627, 813. 9 Co. 59. b. 9 Co. 59. b. Moore 813. 5 Mod. 167. Vide Salk. 417, 418, 419. Carth. 407 to 410.

Sect. 11. Alſo it hath been reſolved, [a] That the ſending of a Letter full of provoking Language to another, without publiſhing it, is highly puniſhable; and if the bare making of a Libel be an Offence, whether it be publiſhed or not, as it ſeemeth to be holden in ſome [b] Books, ſurely the ſending of it to the Party reflected upon, muſt be a much greater Crime, inaſmuch as it ſo manifeſtly tends to a Diſturbance of the Peace.

[a] 1 Keb. 931. 1 Levinz 139. 12 Co. 34. Poph. 139. Ray. 201. 1 Sid. 270. [b] 1 Mod. 58. Hob. 62, 215. 3 Inſt. 174. 4 Inſt. 180, 181. [b] 5 Mod. 167. 9 Co. 59. b. 1 Keb. 832.

Sect. 12. Alſo it ſeems to be agreed, That he who delivers a Paper full of Reflections on any Perſon, in Nature of a Petition to a Committee of

1 Saund. 133. 1 Levinz 240. 1 Sid. 414, 415.

of Parliament, to any other Perſons except the Members of Parliament, may be puniſhed as the Publiſher of a Libel, in reſpect of ſuch a Diſperſing thereof among thoſe who have nothing to do with it.

[a] 9 Co. 59. b. Moore 813. [b] 9 Co. 59. b. Moore 813. [c] Moore 627. 1 Vent. 31. 2 Keb. 502. Salk. 418. Carth. 409.

Sect. 13. But it hath been reſolved, That he who barely reads a Libel in the Preſence [a] of another, without knowing it before to be a Libel, or who hearing a Libel read by another, [b] laughs at it, or who [c] barely ſays, That ſuch a Libel is made upon ſuch a Perſon, whether he ſpeak it with or without Malice, or who is only proved to have had a Libel in his Cuſtody, ſhall not in reſpect of any ſuch Act be adjudged the Publiſher of it. But the having in one's Cuſtody a written Copy of a Libel publickly known, is an Evidence of the Publication of it.

Moore 627.

Sect. 14. Alſo it hath been holden, That he who repeats Part of a Libel in Merriment without Malice, and with no Purpoſe of Defamation, is no way puniſhable; but it ſeemeth, That the Reaſonableneſs of this Opinion may juſtly be queſtioned; for Jeſts of this Kind are not to be endured, and the Injury to the Reputation of the Party grieved is no way leſſened by the Merriment of him who makes ſo light of it.

1 Keb. 832. 1 Saund. 133. 1 Levinz 240. 1 Sid. 414, 415. Skin. 124.

Sect. 15. But it ſeemeth to be ſettled, That the bare Printing of a Petition to a Committee of Parliament (which would be a Libel againſt the Party complained of, if it were made for any other Purpoſe, than as a Complaint in a Courſe of Juſtice) and delivering Copies thereof to the Members of the Committee, ſhall not be look'd upon as the Publication of a Libel, inaſmuch as it is juſtified by the Order and Courſe of Proceedings in Parliament, whereof the King's Courts will take judicial Notice.

Cro. Ca. 175, &c.

Sect. 16. As to the third Point, *viz.* In what manner Offenders of this Kind are to be puniſhed, there ſeemeth to be no Doubt, but that they may be condemned to pay ſuch Fine, and alſo to ſuffer ſuch corporal Puniſhment, as to the Court in Diſcretion ſhall ſeem proper, according to the Heinouſneſs of the Crime, and the Circumſtances of the Offender.

CHAP. LXXIV.

Of the Offence of keeping a Bawdy-Houſe.

THE Offence of keeping a Bawdy-Houſe being of ſo groſs a Nature and there being alſo ſo few Queſtions relating to it worth conſidering, I ſhall paſs it over with theſe following Obſervations:

Kitchen 11. a. 3 Inſt. 205.

1. That it comes under the Cognizance of the Temporal Law, as a Common Nuſance, not only in reſpect of its endangering the Publick Peace, by drawing together diſſolute and debauched Perſons, but alſo in reſpect of its apparent Tendency to corrupt the Manners of both Sexes, by ſuch an open Profeſſion of Lewdneſs.

2. That a Feme-Covert is puniſhable for this Offence as much as if ſhe were ſole, as more fully hath been ſhewn, Chap, 1. Sect. 12.

Salk. 382.

3. That a Lodger who keeps only a ſingle Room for the Uſe of Bawdry is indictable for keeping a Bawdy-Houſe; but that the bare Solicitation of Chaſtity is not indictable.

4. That Offenders of this Kind are puniſhable not only with Fine and Impriſonment, but alſo with ſuch infamous Puniſhment as to the Court in Diſcretion ſhall ſeem proper.

CHAP. LXXV.

Of Common Nuſances.

OFFENCES under the Degree of capital, more immediately againſt the Subject, not amounting to an actual Diſturbance of the Peace, which may be committed by private Perſons without any Relation to an Office, and which are of an inferiour Nature to the ſix Kinds of Offences ſt treated of, being neither infamous nor groſly ſcandalous, ſeem to be reducible to the following Heads:

1. Such as more immediately affect the Publick.
2. Such as more immediately affect the Intereſts of particular Perſons.

Offences of this Kind, more immediately affecting the Publick, are four-fold;

1. Common Nuſances.
2. Monopolies.
3. Foreſtalling, Ingroſſing, and Regrating.
4. Barratry.

And firſt of Common Nuſances; for the better underſtanding whereof ſhall firſt conſider them in general, and then deſcend to thoſe relating to ighways, and Publick Houſes, which ſeem to be the moſt remarkable neral Heads of this Offence.

to Common Nuſances in general I ſhall conſider,

1. What ſhall be ſaid to be a Common Nuſance.
2. How it may be removed,
3. How it may be puniſhed.

Sect. 1. As to the firſt Point it ſeems, That a Common Nuſance may defined to be an Offence againſt the Publick, either by doing a Thing ich tends to the Annoyance of all the King's Subjects, or by neglecting do a Thing which the Common Good requires. 2 Rol. Ab. 83.

Sect. 2. But Annoyances to the Intereſt of particular Perſons are not niſhable by a publick Proſecution as Common Nuſances, but are left to redreſſed by the private Actions of the Parties aggrieved by them. 2 Rol. Ab. 83.

Sect. 3. And from hence it clearly follows, That no Indictment for a ſance can be good, which lays it to the Damage of private Perſons only; where it accuſes a Man of [a] Surcharging ſuch a Common; or of [b] incloſing h a Piece of Ground, wherein the Inhabitants of ſuch a Town have a ght of Common, to the Nuſance of all the Inhabitants of ſuch a Town; of diſturbing a [c] Water-courſe running to the Mill of *J. S. ad grave Dam-* *n J. S. & Tenentium ſuorum*, without ſaying *omnium Ligeorum Domini* *gis*; or of doing a Nuſance to a Thing no way appearing to be of a blick Nature, *ad grave* [d] *Damnum*, or [e] *Detrimentum*, or [f] *commune No-* 1 Sid. 209.

[a] 2 Rol. Ab. 83. Pl. 7. [b] 27 Aſſ. Pl. 6. 2 Rol. Ab. 83. Pl. 7, 12, 13. Cro. El. 90. [c] 2 Rol. Ab. 83. Pl. 10. Vid. 1 Ventr. 26.

Rol. Ab. 83. Pl. 11. [e] 1 Mod. 107. [f] 1 Rol. Re. 406. 3 Keb. 284. Cro. El. 414. Cro. Jac. 382.
und. 135. Cro. El. 148. 2 Keb. 461.

2 Leon. 183, 184. 9 Co. 113. 1 Vent. 208. 3 Keb. 28.

cumentum omnium Ligeorum Domini Regis prope Inhabitantium; yet it hath been reſolved, That an Indictment for not repairing a Bridge by Reaſon whereof it was ruinous, *ita quod Ligei Domini Regis per eam tranſire non poſſunt*, and concluding, *ad Nocumentum eorundem*, is good without uſing the Words *ad Nocumentum omnium Ligeorum, &c.* for by the King's liege People ſhall be underſtood, all his liege People.

27 Aſſ. Pl. 19, 20. 2 Rol. Ab. 83. Pl. 1, 2, 3. 2 Rol. Ab. 84. Pl. 14.

Sect. 4. Alſo it is ſaid, That the Law hath ſo tender a Regard for the Intereſt of the King and of Religion, That an Indictment for doing a Thing which plainly appears immediately to tend to the Prejudice of either of them, is good, though it do not expreſly complain of it as a common Grievance; and upon this Ground it hath been reſolved, That an Indictment for converting the King's Money to one's own Uſe is good without more. And upon the ſame Foundation alſo it hath been holden, That an Indictment for breaking and digging up the Wall of the Church of ſuch a Town, *ad Nocumentum Burgi Ligeorum Domini Regis*, is good.

6 Mod 11. 178, 213, 239, 311. Moor 847. 2 Keb. 410. 1 Keb. 161. 1 Rol. Re. 201.

Sect. 5. Alſo it hath been ſaid, That an Indictment of a common Scold, by the Words *communis Rixatrix*, which ſeem to be preciſely neceſſary in every Indictment of this Kind, is good, though it conclude *ad commune Nocumentum diverſorum* inſtead of *omnium, &c.* perhaps for this Reaſon, becauſe a common Scold cannot but be a common Nuſance. And upon the like Ground it ſeems that it may probably be argued, That an Indictment for laying Logs in the Stream of a navigable publick River, *ad Nocumentum J. S.* may be maintained, becauſe it cannot but be a common Nuſance. And if the Law be ſo in this Caſe, why ſhould not alſo an Indictment ſetting forth a Nuſance to a Way, and expreſly and unexceptionably ſhewing it to be a Highway, be good, notwithſtanding it conclude *in Nocumentum diverſorum Ligeorum, &c.* without ſaying *omnium*; for why ſhould ſuch a Concluſion be more neceſſary in an Indictment for one Kind of Nuſance than for any other? And perhaps the

[a] Cro. El. 148. 2 Keb. 461. Vid. 2 Rol. Ab. 83. Pl. 11.

[a] Authorities which ſeem to contradict this Opinion, might go upon the Reaſon, That in the Body of the Indictment, it did not appear with ſufficient Certainty, whether the Way, wherein the Nuſance was alledged were a Highway, or only a private Way; and therefore that it ſhall be intended from the Concluſion of the Indictment, That it was a private Way.

1 Mod. 76. 2 Keb. 846. 3 Keb. 464. 5 Mod. 142. 1 Vent. 169.

Sect. 6. There is no Doubt but that common Bawdy-Houſes are indictable as common Nuſances, as hath been more fully ſhewn in the foregoing Chapter; alſo it hath been ſaid, That all common Stages for Rope-Dancers, and alſo all common Gaming-houſes, are Nuſances in the Eye of the Law, not only becauſe they are great Temptations to Idleneſs, but alſo becauſe they are apt to draw together great Numbers of diſorderly Perſons, which cannot but be very inconvenient to the Neighbourhood.

1 Rol. Re. 109. 5 Mod. 142. See Ruſhworth's Coll. Part 2. Vol. 1. fol. 220, 247. Skin. 625 to 630.

Sect. 7. Alſo it hath been holden, That a common Play-houſe may be a Nuſance, if it draw together ſuch Numbers of Coaches or People, &c. as prove generally inconvenient to the Places adjacent; and it ſeems to be a proper Diſtinction between Play-houſes and the Nuſances mentioned in the foregoing Section, That Play-houſes having been originally inſtituted with a laudable Deſign of recommending Virtue to the Imitation of the People, and expoſing Vice and Folly, are not Nuſances in their own Nature, but may only become ſuch by Accident, whereas the others cannot but be Nuſances.

[b] 2 Rol. Ab. 138. f. 139. f. 1, 2, 3. 265. E. 1.

Sect. 8. It hath been reſolved, That neither an old nor a new [b] Dovecote, whether it were erected by the Lord of a Manor, or one of

Tenants, is a common Nuſance; for if a Dove-cote were a common Nuſance, it could never become lawful by any Licence or Preſcription whatſoever, becauſe every Nuſance is a *Malum in ſe*; but it is certain, that a Dove-houſe may be juſtified by a Preſcription, and that it is ſo far countenanced by the Law, as to be [a] demandable in a *Præcipe* before any Land whatſoever which is not built upon, and that the Owner may juſtify the taking another's [b] Hawk, which he ſhall find at his Dove-houſe, flying at his Pigeons; and from hence it ſeems clearly to follow, That though a Tenant, who builds a Dove-houſe without the Licence of the Lord of the Manor, may perhaps be liable to an Action on the Caſe at the Suit of ſuch Lord, whoſe Prerogative is ſaid to be incroached upon by the erecting ſuch a Houſe without his Licence, yet he cannot be puniſhed for it by a publick Proſecution.

2 Rol. Re. 4, 30. Cro. Ja. 382, 491. Moor 238. 1 Rol. Re. 136, 201. Popham 143. Con. 5 Co. 104. b. [a] F. N. B. 2. c. [b] 16 E. 4. 7. b. Quære Moor Pl. 580 & 621. Cro. El. 548.

Sect. 9. But perhaps it may be argued, That if this Reaſoning be good, it will follow from the ſame Ground, That a Gate erected in a Highway will be alſo no Nuſance; becauſe, if it were, it could not be juſtified by any Preſcription, as it is agreed that it may be; but to this it may be anſwered, That the Erecting of ſuch a Gate is therefore a Nuſance, becauſe it interrupts the People in that free and open Paſſage which they before enjoyed, and were lawfully intitled to; but where ſuch a Gate has continued time out of Mind, it ſhall be intended, That it was ſet up at firſt by conſent, on a Compoſition with the Owner of the Land on the laying out the Road, in which Caſe the People had never any Right to a freer Paſſage than what they ſtill enjoy.

1 Jones 221. Cro. Ca. 184. 1 Bulſ. 203. 2 Rol. Ab. 137. C.

Sect. 10. It hath been holden, That it is no common Nuſance to make Candles in a Town, becauſe the Needfulneſs of them ſhall diſpenſe with the Noiſomneſs of the Smell; but the Reaſonableneſs of this Opinion ſeems juſtly to be queſtionable, becauſe whatever Neceſſity there may be that Candles be made, it cannot be pretended to be neceſſary to make them in a Town; and ſurely the Trade of a Brewer is as neceſſary as that of a Chandler; and yet it ſeems to be agreed, That a Brew-houſe, erected in ſuch an inconvenient Place, wherein the Buſineſs cannot be carried on without greatly incommoding the Neighbourhood, may be indicted as a common Nuſance: And ſo in the like Caſe may a Glaſs-Houſe or Swine-ſtyard.

2 Rol. Ab. 139. Pl. 2. Cont. 3 Mod. 138. 2 Keb. 500. Vide 1 Danv. A. 173, 174. Salk. 458, 460.

Sect. 11. It ſeemeth certain, That it is a common Nuſance to divert Part of a publick navigable River, whereby the Current of it is weakened, and made unable to carry Veſſels of the ſame Burden, as it could before. Alſo it hath been holden to be a common Nuſance to divide a Houſe in a Town for poor People to inhabit in, by reaſon whereof it will be more dangerous in the Time of Infection of the Plague.

Noy 103. 2 Rol. Ab. 139. Pl. 3.

Sect. 12. As to the ſecond Point, *viz.* How a Nuſance may be removed; it ſeemeth to be certain, That any one may pull down or otherwiſe deſtroy a common Nuſance, as a new Gate, or even a new Houſe erected in a Highway, *&c.* for if one whoſe Eſtate is, or may be, prejudiced by a private Nuſance actually erected, as a Houſe hanging over his Ground, or ſtopping his Lights, *&c.* may juſtify the entring into another's Ground, and pulling down and deſtroying ſuch a Nuſance, whether it were erected before or ſince he came to the Eſtate, ſurely it cannot but follow *à fortiori*, That any one may lawfully deſtroy a common Nuſance: And as the Law is now holden, it ſeems, that in a Plea, juſtifying the Removal of the Nuſance, you need not ſhew that you did as little Damage as might be.

2 Rol. Ab. 144. S. Cro. Ca. 184. 1 Jon. 221. 2 Rol. A. 145. U. W. Salk. 459. Yelv. 142. 5 Co. 101. b. 9 Co. 54. b. 1 Rol. Rep. 9 E. 4. 35. Bro. Nuſance 14. 1 Jon. 221. Salk. 458.

Sect. 13.

37 Aſſ. 10. 2 Rol. Ab. 137. A.

Sect. 13. It hath been adjudged, That if a River be ſtopped, to the Nuſance of the Country, and none appear bound by Preſcription to clear it, thoſe who have the Piſcary, and the neighbouring Towns, who have a common Paſſage and Eaſement therein, may be compelled to do it.

6 Mod. 11, 178, 213.

Sect. 14. As to the third Point, *viz.* In what Manner common Nuſances may be puniſhed; it is ſaid, That a common Scold is puniſhable by being put into the Ducking-Stool, and there is no Doubt, but that whoever is convicted of another Nuſance, may be fined and impriſoned; and it is ſaid, That one convicted of a Nuſance, done to the King's Highway may be commanded by the Judgment to remove the Nuſance at his own Coſts; and it ſeemeth to be reaſonable, That thoſe who are convicted of any other common Nuſance ſhould alſo have the like Judgment.

2 Rol. Ab. 84. Pl. 15.

CHAP. LXXVI.

Of Nuſances relating to Highways.

AND now I am particularly to conſider ſuch Nuſances as relate to Highways, and publick Houſes;

And firſt for the better Underſtanding of thoſe which concern Highways, I ſhall conſider:

1. Such as relate to Highways in general.
2. Such as relate to Bridges in particular.

For the better Underſtanding of Nuſances relating to highways in general, I ſhall examine the following Particulars:

1. What ſhall be ſaid to be a Highway.
2. At whoſe Charge and by whom it ought to be repaired.
3. In what Manner it is to be inlarged.
4. How the Surveyors thereof ſhall be appointed.
5. How ſuch Surveyors ought to execute their Office.
6. What ſhall be ſaid to be a Nuſance to the Highway.
7. How ſuch Nuſances are to be removed and puniſhed.
8. In what Manner thoſe who are charged with any Offence relating to the Highway, are to be proceeded againſt.
9. How Perſons ſo proceeded againſt may defend themſelves.

As to the firſt Point, *viz.* What ſhall be ſaid to be a Highway, it is ſaid that there are three Kinds of Ways:

1. A Footway, which is called in *Latin*, *Iter.*

Co. Lit. 56. a.

2. A Pack and Prime-way, which is both a Horſe and Foot-way, and called in *Latin*, *Actus.*
3. A Cart-way, which contains the other two; and alſo a Carriage-way, and is called in *Latin*, *Via* or *Aditus*, and this is either com-

mon to all Men, and then it is called, *Via Regia*, or belongs to ſome City or Town, or private Perſon, and then it is called *Communis Strata*.

Sect. 1. It ſeemeth that any one of the ſaid Ways, which is common all the King's People, whether it lead directly to a Market-Town, or ly from Town to Town, may properly be called a Highway, and that y ſuch Cartway may be called the King's Highway, and that a Nuſance any of the ſaid Ways is puniſhable by Indictment in the Court-Leet; r Indictments for [a] ſtopping Horſeways, and [b] Footways, have often been owed, and where others have been quaſhed, no other Reaſon has been ven for it, but that the Way was not called a common Way or High- ay; and in [c] Books of the beſt Authority, a River common to all Men, called a Highway; and it is laid [d] down as a general Rule, That Nu- nces to any Way common to all Men, are inquirable in the Leet, and orſe-Cauſeys are taken Notice of by [e] Parliament; and therefore there ems to be no Reaſon why any Way leading from Village to Village, hich does not terminate there, but is alſo a Thoroughfare to other Towns, ay not properly be called a common or Highway, or why a Nuſance erein ſhould not be indictable, whether it directly lead to a Market- own or not; for ſince ſuch a Way lies open to all the King's Subjects, Nuſance therein [f] cannot but be a common Nuſance, and if it be not niſhable by Indictment it would not be puniſhable at all, inaſmuch as it eems to be certain, That it is not puniſhable by Action, becauſe if one an might bring his Action in Reſpect of the Poſſibility of the Damage hich he might receive from it, all other Men may do the like, which ould introduce a Multiplicity of Actions; and therefore the Diſtinction hich is taken in ſome [h] Books concerning this Matter ſeems to be very aſonable, That every Way from Town to Town may be called a High- ay, becauſe it is common to all the King's Subjects, but that a Way to Pariſh-Church, or to the common Fields of a Town, or to a private ouſe, or perhaps to a Village which terminates there, and is for the Be- efit of the particular Inhabitants of ſuch Pariſh, Houſe, or Village only, ay be called a private Way, but not a Highway, becauſe it belongeth ot to all the King's Subjects, but only to ſome particular Perſons, each f which, as it ſeems, may have an Action on the Caſe for a Nuſance herein.

Palm. 389.
6 Mod. 255.
[a] Cro. El. 63.
[b] 1 Vent. 208. 2 Keb. 178. 3 Keb. 28. 6 Mod. 255.
[c] 27 Aſſ. 23.
[d] Co. Lit. 56. a. 5 Ed. 4. 2. b.
[e] 3 & 4 W. & M. 12.
[f] Kitchin 35. a. Palm. 389. 2 Rol. Re. 412. 2 Moore 180. Pl. 321. Cro. E. 664. Co. Lit. 56. a. 27 H. 8. 27. a.
[h] 1 Vent. 189. Kitch. 35. a. 1 Vent. 208. 3 Keb. 28.
Co. Lit. 56.

Sect. 2. It hath been holden, that if there be a Highway in an open field, and the People have uſed, Time out of Mind, when the Ways are ad, to go by Outlets on the Land adjoining, ſuch Outlets are Parcel of the Way; for the King's Subjects ought to have a good Paſſage, and the good aſſage is the Way, and not only the beaten Track; from whence it fol- ows, That if ſuch Outlets be ſown with Corn, and the beaten Track be ounderous, the King's Subjects may juſtify going upon the Corn.

1 Rol. A. 390. Pl. 1.

Sect. 3. It ſeemeth to be agreed, That an ancient Highway cannot e changed without the King's Licence firſt obtained upon a Writ of *Ad uod damnum*, and an Inquiſition thereon found, That ſuch a Change will ot be prejudicial to the Publick; and it is ſaid, That if one change a Highway without ſuch Authority, he may ſtop the new Way whenever e pleaſes; and it ſeemeth, That the King's Subjects have not ſuch an nterest in ſuch new Way as will make good a general Juſtification of heir going in it as in a common Highway, but that in an Action of Treſpaſs brought by the Owner of the Land againſt thoſe who ſhall go ver it, they ought to ſhew ſpecially, by Way of Excuſe, how the old Way was obſtructed, and the new one ſet out; alſo it is ſaid, That the

Cro. Ca. 266, 267. Vaugh. 341.
Cro. Ca. 267. Yelv. 141, 142.

Inhabitants are not bound to keep Watch in ſuch a new Way, or to make Amends for a Robbery therein committed, or to repair it.

Cro. Ca. 267. *Sect.* 4. However it is certain, That a Highway may be changed by the Act of God; and therefore it hath been holden, That if a Water which has been an ancient Highway, by Degrees changes its Courſe, and goes over 22 Aſſ. 93. 1 Rol. A. 390. different Ground from that whereon it uſed to run, yet the Highway continues in the new Chanel, in the ſame Manner as in the old.

As to the ſecond Point, *viz.* At whoſe Charge, and by whom the Highway ought to be repaired, I ſhall conſider:

1. What Proviſion is made by the Common Law concerning this Matter.
2. What by Statute.

a 1 Rol. Ab. 890. b March 26. 1 Vent. 90, 183, 189. H. P. C. 144. 8 H. 7. 5. *Sect.* 5. As to the firſt of theſe Particulars, it ſeems to be agreed, That of common Right, the general Charge of Repairing all Highways lies on the Occupiers of the Lands in the Pariſh wherein they are; but it is ſaid, That the Tenants of the Lands adjoining are bound to ſcowr their Ditches, and there is no Doubt but particular Perſons may be burthened with the general Charge of Repairing a Highway, in two Caſes:

1. In Reſpect of an Incloſure of the Land wherein it lies.
2. In Reſpect of a Preſcription.

1 Rol. Ab. 390. B. Cro. Ca. 366. 1 Sid. 464. *Sect.* 6. And firſt a particular Perſon may be bound to repair a Highway in Reſpect of an Incloſure, as where the Owner of Lands not incloſed, next adjoining to the Highway, incloſes his Lands on both Sides thereof, in which Caſe he is bound to make a perfect good Way, and ſhall not be excuſed for making it as good as it was at the Time of the Incloſure, if it were then any way defective, becauſe, before the Incloſure, the People uſed, when the Way was bad, to go for their better Paſſage, over the Fields adjoining, out of the common Track, which Liberty is taken away by the Incloſure.

1 Sid. 464. *Sect.* 7. Alſo it hath been holden, That if one incloſe Land on one Side, which hath been anciently incloſed of the other Side, he ought to repair all the Way, but that if there be not ſuch an ancient Incloſure of the other Side, he ought to repair but Half that Way: And it is ſaid, That where-ever one is bound to repair a Highway in reſpect of an Incloſure, and lays it open again as it was before, he ſhall be freed from the Charge of repairing it.

2 Saund. 160. 27 Aſſ. 8. 21 Ed. 4. 38. b. Brook Preſcription 49, 78. Far. 54, 55. *Sect.* 8. Secondly, A particular Perſon may be bound to repair a Highway in reſpect of a Preſcription; and it is ſaid, That a Corporation aggregate may be compelled to do it by Force of a general Preſcription, That it ought and hath uſed to do it, without ſhewing, that it uſed to do ſo in Reſpect of the Tenure of certain Lands, or for any other Conſideration, becauſe ſuch a Corporation in Judgment of Law never dies, and therefore, if it were ever bound to ſuch a Duty, it muſt needs continue to be always ſo; neither is it any Plea, That ſuch Corporation have always done it out of Charity; for what it hath always done it ſhall be preſumed to have been always bound to do; but it is ſaid, 21 Ed. 4. 31. b. That a Perſon cannot be charged with ſuch a Duty by a general Preſcription from what his Anceſtors have done, becauſe no one is bound to do what his Anceſtors have done, unleſs it be for ſome ſpecial Reaſon, as the

e having Land deſcended from ſuch Anceſtors, which are holden by ſuch
e Service, &c. yet it ſeems, That an Indictment charging a Tenant in Kellew. 52. a.
e-ſimple with having uſed of Right to repair ſuch a Way *ratione Te-* Latch 206.
ræ Terræ ſuæ, is certain enough, without adding, That his Anceſtors,
thoſe whoſe Eſtate he hath, have always ſo done, for that is implied in
ing, That he has always uſed to do it *ratione Tenuræ ſuæ*. Alſo an
ccupier, as ſuch, though at Will only, is indictable for ſuffering a Houſe Salk. 357, 2.
nding upon the Highway to be ruinous, &c. and the Words *ratione Te-*
ræ, &c. if added, are Surplus.

Sect. 9. However it ſeemeth certain, That whether a particular Perſon 1 Mod. 112.
bound to repair a Highway by Incloſure, or Preſcription, &c. yet the 3 Keb. 301.
riſh cannot take Advantage of it upon the Plea of Not guilty to an In- 1 Ven. 256.
tment againſt them for not repairing it, but ought to ſet forth their Diſ-
arge in a ſpecial Plea.

And now I am to conſider in the ſecond Place, at whoſe Charge, and whom the Highway ought to be repaired by Force of the Statute; for better Underſtanding whereof, I ſhall examine:

1. Who are by Statute compellable to work in the Repairs thereof in their own Perſons, or by others.
2. Who may be aſſeſſed to a Rate made for the Defraying of the extraordinary Charges of ſuch Repairs.
3. What other Proviſions have been made to this Purpoſe.
4. In what manner the Profits of Lands ſettled in Truſt for the Repairs of the Highways ſhall be imployed.

Sect. 10. As to the firſt Point, it is enacted by 2 & 3 *Ph. & Mar.* 8. Par. 2. 22 *Car.* 2. 12. *That the Pariſhioners of every Pariſh ſhall endeavour themes to the Amending of the Highways therein, and ſhall be chargeable thereo as followeth*; that is to ſay, *Every Perſon for every Plough-land in Til- or Paſture, That he or ſhe ſhall occupy in the ſame Pariſh, and every o- Perſon keeping there a Draught or Plough, ſhall find and ſend at every and Place to be appointed for the amending of the Ways in the Pariſh, one in or Cart, furniſhed after the Cuſtom of the Country, with Oxen, Horſes, ther Cattle, and all other Neceſſaries meet to carry Things convenient for Purpoſe, and alſo two able Men with the ſame, upon Pain of every Draught ing Default, ten Shillings; and every Houſholder, and alſo every Cottager Labourer of that Pariſh, able to labour, and being no hired Servant by the r, ſhall by themſelves, or one ſufficient Labourer for every of them, upon y of the ſaid Days, work and travel in the Amendment of the ſaid High- s, upon Pain of every Perſon making Default, to loſe for every Day, one lling and Six-pence: And if the ſaid Carriages of the Pariſh, or any of* 22 Ca. 2. 12. Par. 9.
ſhall not be thought needful by the Surveyors, to be occupied upon any of the Days, that then every ſuch Perſon that ſhould have ſent any ſuch Car- e, ſhall ſend to the ſaid Work, for every Carriage ſo ſpared, two able , there to labour for the Day, upon Pain to loſe for every Man not ſo ſent he ſaid Work, Twelve-pence; and every Perſon and Carriage aboveſaid have and bring with them ſuch Shovels, Spades, Picks, Mattocks, and o- Tools and Inſtruments as they do make their own Ditches and Fences with- nd ſuch as be neceſſary for their ſaid Work: And all the ſaid Perſons and riages ſhall do and keep their Work, as they ſhall be appointed by the ſaid rviſors, or one of them, eight Hours of every the ſaid Days, unleſs they be otherwiſe licenced by the ſaid Superviſors, or one of them.

Sect. 11.

Sect. 11. And it is farther enacted by 18 *El.* 10. Par. 2. *That every Perſon or Perſons (except ſuch as dwell in the City of* London) *that ſhall be aſſeſſed to the Payment of any Subſidy to Her Majeſty, to five Pounds in Goods, or forty Shillings in Lands, or above, during all ſuch Time as he ſhall ſtand ſo aſſeſſed and not altered, and being none of the Parties chargeable for the Amendment of Highways by any former Law, but as a Cottager, ſhall find two able Men yearly to labour in the Highways, at the Times appointed.*

Sect. 12. And it is farther enacted by the ſaid Statute, Par. 3. *That every other that ſhall occupy a Plough-land in Tillage or Paſture, lying in ſeveral Pariſhes, ſhall be chargeable to the making of the Ways within the Pariſh where he dwelleth, as far forth, and in ſuch Manner and Form as any Perſon having a Plough-land in any one Pariſh, is or ought to be chargeable.*

Dal. ca. 26.
3 Keb. 568.
2 Keb. 617.

Sect. 13. It was made a great Doubt in the Conſtruction of theſe Statutes, what ſhould be accounted a Plough-land within the Purview of them, for the ſettling whereof it was enacted by 7 & 8 *W.* 3. 29. *That any Perſon that ſhall have in his or her Occupation, Wood-land, or other Land, to the Value of fifty Pounds* per Annum, *ſhall be adjudged and deemed to have a Plough-land, as to all, or any of the Purpoſes within any of the Statutes before that Time made, of or concerning the Highways, any Thing in Them, or any Uſage, or Cuſtom to the contrary, in any wiſe notwithſtanding.*

Sect. 14. Alſo it is farther enacted by the above mentioned Statute of 22 *Car.* 2. 12. Par. 8. *That in ſuch Places where there is no Uſe of Carts, and Teams for the Amendment of the Highways, but the Uſage and Practice is to carry Stones, Gravel, Earth, or other Materials for ſuch Amendment, upon the Backs of Horſes, or by any other Kinds of Carriages; that in all ſuch Places the Inhabitants uſing any ſuch Horſes or other Carriages, ſhall ſend in ſuch their Horſes as are accuſtomed to that Kind of Labour, and ſuch their other Carriages, with able Perſons to work with the ſame, in like Manner, and under the like Directions, Forfeitures and Penalties, as by any former Statute for repairing of Highways, is appointed for Carts and Teams.*

In the Expoſition of theſe Statutes the following Opinions have been holden,

[a] 3 Keb. 255, 476.
2 Ven. 273.
Watſ. ca. 40.
2 Inſt. 704.

Sect. 15. I. That [a] Perſons in Holy Orders are within the Purview of them, in reſpect of their Spiritual Poſſeſſions, as much as any other Perſon whatſoever, in reſpect of any other Poſſeſſions, for the Words are general, and there is no Kind of Intimation that any particular Perſons ſhall be exempted more than others.

[b] Raym. 186.
3 Keb. 567, 468.
Vide Dalt. ca. 26.
2 Keb. 617.

Sect. 16. II. [b] That he who keeps ſeveral Draughts in a Pariſh is bound to ſend a Team for each Draught, whether he occupy any Land in the Pariſh, or not; and in like Manner, That he who occupies ſeveral Plough-lands, ought to ſend a Team for each Plough-land, whether he keep a Draught, or not.

[c] Palm. 389.
2 Rol. Re. 412.

Sect. 17. III. That [c] notwithſtanding the Words of the Statute extend only to the Occupiers of Land, yet if the Owner neither occupy them nor let them, but ſuffer them to lie freſh, he ſhall be charged as much as if he had occupied them, for there is no Reaſon that the Publick ſhall ſuffer for his Negligence.

Dalt. ca 26.

Sect. 18. IV. That it is no Excuſe for the Inhabitants of a Pariſh, being indicted at Common Law for not repairing the Highways, That they have done the full Work required of them by Statute, for ſince theſe Statutes are wholly in the Affirmative, and made in Aid of the Common Law, and to ſupply the Defects thereof, they ſhall not be conſtrued to abrogate any Proviſion thereby made for theſe Purpoſes.

Sect. 19. *Dalton* is of Opinion, That he who keeps a Draught and but two Horſes, ought to attend therewith at the Times appointed, and that if he carry with them ſuch Loads as they are able to draw, he ſhall be excuſed. Dalt. ca. 26.

Sect. 20. As to the ſecond Point, *viz.* Who may be aſſeſſed to a Rate made for the defraying of the extraordinary Charges of ſuch Repairs, it is enacted by the above mentioned Statute of 22 *Car.* 2. 12 Par. 10, 11. and 3 & 4 *W.* & *M.* 12. *That where the Juſtices of the Peace of any County, City, or other Place, or the major Part of them, at their General or Quarter-Seſſions, ſhall be fully ſatisfied that the common Highways, Cauſeys, Bridges, Streets or Pavements, within any Pariſh, Townſhip, or Hamlet,* &c. *within their reſpective Juriſdiction, cannot be ſufficiently amended, repaired, and ſupported, by Means of the Laws then in Force, without the Help of the ſaid Acts; in all ſuch Caſes one or more Aſſeſſment, or Aſſeſſments, upon all and every the Inhabitants, Owners, and Occupiers of Lands, Houſes, Tenements, and Hereditaments, or any perſonal Eſtate, uſually rateable to the Poor, within any ſuch Pariſh, Townſhip, or Hamlet,* &c. *ſhall be made, levied, collected, and allowed, by ſuch Perſon and Perſons, and in ſuch Manner as the ſaid Juſtices by their Order at ſuch Seſſions ſhall direct and appoint in that Behalf: And the Money thereby raiſed ſhall be imployed and accounted for, according to the Order and Directions of the ſaid Juſtices, for and towards the Amending, Repairing, Paving, Cleanſing and Supporting ſuch Highways, Cauſeys, and Bridges, from Time to Time, as Need ſhall require, and the ſaid Aſſeſſments ſhall be levied by Diſtreſs and Sale of Goods for Non-Payment upon Demand,* &c. *Provided that no ſuch Aſſeſſment or Aſſeſſments to be made in any one Year, ſhall exceed the Rate of Six-pence in the Pound of the yearly Value of any Lands, Houſes, Tenements and Hereditaments, ſo aſſeſſed, nor the Rate of Six-pence for twenty Pounds in perſonal Eſtate.*

Sect. 21. An it is farther enacted by the above mentioned Statute of 3 & 8 *W.* 3. 29. *Par.* 4. *That if any Inſhip, Liberty, Precinct, or Vill, that uſes to repair their own Highways, ſhall have levied the Rate of Six-pence in the Pound, and imployed the ſame towards the Repair of the Highways, and yet the ſaid Highways are not ſufficiently repaired, in ſuch Caſes it ſhall be lawful for the Juſtices of the Peace at their ſpecial Seſſions to be held every four Months, for the Conſideration of the Highways, to order the whole Pariſh to contribute to the Repairing thereof.*

Sect. 22. It is recited by 3 & 4 *W.* & *M.* 12. *That divers Pariſhes and Townſhips, having not any Gravel-ſtones, Quarries, nor any other Materials fitting or convenient for the Amending or Repairing of the Highways within the ſaid Pariſhes and Townſhips, the Surveyors of the Highways of ſuch Pariſhes and Townſhips, had been forced to lay out their own Money for the Buying of ſuch Materials as were neceſſary for that Purpoſe, and yet had no Remedy by any Law then in Force for a Reimburſement of ſuch Expences*; and thereupon it is enacted, *That upon Notice given by the Surveyor or Surveyors of the Highways to the Juſtices of the Peace at their ſpecial Seſſions, and Oath made of what Sum or Sums of Money, he or they have or hath ſo laid out and expended, upon Amending and Repairing of the ſaid Highways, the Juſtices of Peace, or any two of them, at their ſpecial Seſſions, may by Warrant under their Hands and Seals, cauſe an equal Rate to be made for the Re-imburſing the ſaid Surveyor or Surveyors, the Monies by him or them laid out as aforeſaid, upon all the Inhabitants of ſuch Pariſh or Townſhip where ſuch Monies are expended, according to the Rules and Methods preſcribed by* 43 El. 2. *which Rate being confirmed and allowed by the ſaid Juſtices in their ſpecial Seſſions, ſhall be collected and gathered by the ſaid Surveyor or Surveyors of the Highways; and if any Perſon or Perſons refuſe to pay the Monies ſo aſſeſſed on him or them, that then the ſame ſhall*

be levied by the ſaid Surveyors by Diſtreſs and Sale of the Goods and Chattels of the Perſons ſo refuſing, rendring to the Party the Overplus, reaſonable Charges for making the ſaid Diſtreſs firſt to be deducted. If the Juſtices refuſe to make ſuch a Rate, they are compellable by Mandamus *from the King's Bench, on Affidavit of the Monies having been laid out; and the* Mandamus *ſhall be directed to the Juſtices of the County, and ſerved on thoſe of the privy Seſſions.*

The King againſt the Inhabitants of Newton in Cheſhire.

Sect. 23. As to the third Point, *viz.* What other Proviſions have been made to this Purpoſe, it is enacted by the ſaid Statute of 3 & 4 *W.* & *M.* 12. *That no Fine, Iſſue, Penalty, or Forfeiture, for not repairing any Highways, ſhall be returned into the Court of Exchequer, or other Court, but ſhall be levied and paid into the Hands of the Surveyors of the Pariſh or Place, to be applied towards the Repair and Amendment of ſuch Highway; and that if any Fine, Penalty, or Forfeiture, impoſed on any Pariſh or Place, for not repairing the Highways, ſhall hereafter be levied on any one, or more, of the Inhabitants of ſuch Pariſh or Place, that then ſuch Inhabitant or Inhabitants ſhall make his or their Complaint to the Juſtices of the Peace at their ſpecial Seſſions, and the ſaid Juſtices, or any two of them, are by the ſaid Statute impowered and authorized by Warrant under their Hands and Seals, to cauſe a Rate to be made, according to the Form and Manner* [a] *aforeſaid, for the Re-imburſing ſuch Inhabitant or Inhabitants the Money ſo levied on him or them, as aforeſaid, which Rate ſo made, and confirmed by two Juſtices, as aforeſaid, ſhall be collected, and levied by the Surveyor or Surveyors of the Highways of ſuch Pariſh or Place ſo preſented or indicted, as aforeſaid, and the ſaid Surveyor or Surveyors ſhall within one Month next after the Making and Confirming the Rute aforeſaid, pay unto the Inhabitant or Inhabitants, ſuch Money ſo levied on him or them, as aforeſaid.*

[a] See the precedent Section.

Sect. 24. Alſo the later Statutes which have impoſed any Penalties on Surveyors of the Highways, or others, for any Offences relating to the Highways, have generally ordained that the Whole, or Part thereof, ſhall be applied to the Repairs of the Highways of the Place wherein the Offence ſhall be committed, as will more fully appear in the ſubſequent Part of this Chapter.

Sect. 25. As to the fourth Point, *viz.* In what Manner the Profits of Lands ſettled in Truſt for the Repairs of the Highways ſhall be employed, it is enacted by the above mentioned Statute of 22 *Car.* 2. 12. Par. 2. *That where any Lands have been, or ſhall be given for the Maintenance of Cauſeys, Pavements, Highways and Bridges, all ſuch Perſons that are, or ſhall be, enfeoffed, or truſted with any ſuch Lands, ſhall let them to farm at the moſt improved yearly Value without Fine; and that the Juſtices of Peace in their ſpecial Seſſions ſhall enquire by ſuch Ways and Means as they think fitting, into the Value of all ſuch Lands ſo given, or to be given, and order the Improvement and Imployment of the Rents and Profits thereof, according to the Will and Direction of the Donor of ſuch Lands, if they find that the Perſons ſo intruſted have been negligent or faulty in the Performance of their Truſt, (except ſuch Lands have been given to the Uſes aforeſaid, to any College or Hall in either of the Univerſities of this Kingdom, which have Viſitors of their own) any Law, Statute, Uſage, or Cuſtom, to the contrary notwithſtanding.*

Sect. 26. As to the third general Head of this Chapter, *viz.* In what Manner the Highway is to be enlarged, it is enacted by 13 *Ed.* 1. *Stat.* 2. commonly called the Statute of *Wincheſter*, Chap. 5. *That Highways leading from one Market-Town to another ſhall be enlarged, ſo that there be neither Dyke, Tree nor Buſh, whereby a Man may lurk to do Hurt, within two hundred Foot on the one Side, and two hundred Foot of the other Side of the Way: So that the Statute ſhall not extend to Aſhes, nor unto great Trees, &c. and if by Default of the Lord that will not avoid the Dyke, Underwood, or Buſhes, in the Manner aforeſaid*

aforeſaid, any Robberies be done therein, the Lord ſhall be anſwerable for the Felony, and if Murder be done, the Lord ſhall make a Fine at the King's Pleaſure: And if the Lord be not able to fell the Underwoods, the Country ſhall aid him therein. And the King willeth, that in his Demean Lands and Woods within his Foreſt, and without, the Ways ſhall be enlarged, as before is ſaid. And if per-caſe a Park be taken from the Highway, it is requiſite that the Lord ſhall ſet his Park the Space of two hundred Foot from the Highways, as before is ſaid, or that he make ſuch a Wall, Dyke, or Hedge, that Offenders may not paſs nor return to do Evil.

Sect. 27. Alſo it is enacted by the above mentioned Statute of 3 & 4 *W.* & *M.* 12. *That the Surveyors of the Highways ſhall make every Cartway leading to any Market-Town, eight Foot wide at the leaſt, and as near as may be, even and level.*

Sect. 28. And it is farther enacted and declared by the ſame Statute, *That no Horſe-Cauſey, or Cauſey for Horſes, travelling upon, or in any publick Highway, be leſs or under three Foot in Breadth.*

Sect. 29. Alſo it is enacted by 8 & 9 *W.* 3. 15. *That the Juſtices of the Peace of any County, City, Riding, Diviſion, Liberty, or Place, or the major Part of them, being five at the leaſt, at their Quarter-Seſſions, ſhall have Power to enlarge or widen any Highways in their reſpective Countries, Ridings, Diviſions, Liberties, or Places, ſo that the Ground to be taken into the ſaid Highways do not exceed eight yards in Breadth, and that the ſaid Power do not extend to pull down any Houſe, or to take away the Ground of any Garden, Orchard, Court, or Yard: And for the Satisfaction of the Perſons who are Owners of, or may be intereſted in, the ſaid Ground that ſhall be laid into the ſaid Highways, the ſaid Juſtices are by the ſaid Statute impowered to impanel a Jury before them, and to adminiſter an Oath to the ſaid Jury, That they will aſſeſs ſuch Damages to be given, and Recompence to be made to the Owners and others intereſted in the ſaid Ground, for their reſpective Intereſts, as they ſhall think reaſonable, not exceeding five and twenty Years Purchaſe for Lands ſo laid out, and likewiſe ſuch Recompence as they ſhall think reaſonable for the Making of a new Ditch and Fence to that Side of the Highway that ſhall be ſo enlarged, and alſo Satisfaction to any Perſon that may be otherwiſe injured by the enlarging of the ſaid Highways: And upon Payment of the ſaid Money ſo awarded, or leaving it in the Hands of the Clerk of the Peace of the reſpective County, for the Uſe of the Owner, or of others intereſted in the ſaid Ground, the Intereſt of the ſaid Perſons ſhall be for ever diveſted out of them, and the Ground that ſhall be laid into any Highway by Virtue of the ſaid Act, ſhall be eſteemed a publick Highway to all Intents and Purpoſes whatſoever; and the ſaid Juſtices ſhall have Power to order one or more Aſſeſſment or Aſſeſſments to be made, levied, or collected, upon all and every the Inhabitants, Owners, or Occupiers of Lands, Houſes, Tenements or Hereditaments, in their reſpective Pariſhes or Places that ought to repair the ſame, on ſuch Perſon or Perſons, and in ſuch Manner as the ſaid Juſtices at ſuch Seſſions ſhall direct and appoint; and the Money thereby raiſed ſhall be employed and accounted for, according to the Order and Direction of the ſaid Juſtices, for and towards the Purchaſing of the Land to enlarge the ſaid Highways, and for the making the ſaid Ditches and Fences: And the ſaid Aſſeſſments ſhall, by Order of the ſaid Juſtices, be levied by the Overſeers of the Highways, by Diſtreſs and Sale of the Goods of Perſons ſo aſſeſſed, not paying the ſame within ten days after Demand, rendring the Overplus of the Value of the Goods ſo diſtrained to the Owner and Owners thereof (the neceſſary Charges being firſt deducted).*

Sect. 30. But it is provided by the ſaid Statute, *That no ſuch Aſſeſſment or Aſſeſſments made in any one Year, for enlarging of Highways, ſhall exceed the Rate of Six-pence in the Pound of the yearly Income of any Lands, Houſes,*

Tene-

Tenements, and Hereditaments, nor the Rate of Six-pence in the Pound for perſonal Eſtates.

Sect. 31. Alſo it is farther enacted by the ſaid Statute, *That the Juſtices of Peace at their Quarter-Seſſions, at the Requeſt of any Perſon, for the putting in Execution the Powers contained in the ſaid Act for the Enlarging of Highways, ſhall iſſue out their Precepts to the Owner or Owners of Ground, or others intereſted in the ſame, that are to be laid into the ſaid Highways, to appear at the next Quarter-Seſſions, or ſhew Cauſe why the ſaid Highways ſhould not be enlarged.*

Sect. 32. And it is farther enacted, *That if any Order or Decree ſhall be made by the ſaid Juſtices for the laying out of Ground for the Enlarging of Highways, the Owners or Proprietors of the ſaid Ground ſhall have free Liberty, within eight Months after ſuch Order, to cut down any Wood or Timber growing upon the ſaid Ground, or upon the Neglect thereof, that the ſame ſhall be ſold by Order of the ſaid Juſtices, and the Owners of ſuch Wood or Timber ſhall receive the full of what ſhall be made thereof, the Charges being firſt deducted.*

Sect. 33. And it is farther enacted, *That any Perſon grieved by the Order or Decree of the ſaid Juſtices may appeal to the Judges of Aſſize at the next Aſſize only to be held for the County where ſuch Decree or Order ſhall be made, and any of the ſaid Judges are by the ſaid Statute impowered to examine, affirm, or reverſe the ſaid former Order and Decree, as in Judgment they ſhall think fit, and if affirmed, to award Coſts againſt ſuch Appellants for their Vexation and Delay, and to cauſe the ſame to be levied by Diſtreſs and Sale of the Appellant's Goods, rendring the Overplus to the ſaid Appellants.*

Sect. 34. And it is farther enacted by the ſaid Statute, *That where any common Highway ſhall be incloſed after a Writ of* Ad quod damnum *iſſued, and Inquiſition thereupon taken, any Perſon grieved by ſuch Incloſure, may make his Appeal to the Quarter-Seſſions of the County to be held next after ſuch Inquiſition taken, which ſhall finally hear and determine ſuch Appeal; and if no ſuch Appeal be made, then the ſaid Inquiſition and Return entred and recorded by the Clerk of the Peace of ſuch County at the Quarter-Seſſions, ſhall be for ever afterwards binding to all Perſons whatſoever.*

Sect. 35. As to the fourth general Head of this Chapter, *viz.* In what Manner the Surveyors of the Highways ſhall be appointed, it is enacted by 3 & 4 *Will. & Mar.* 12. *That upon the ſix and twentieth Day of* December *every Year, unleſs that Day be Sunday, and then on the ſeven and twentieth, the Conſtables, Headboroughs, Tithing-men, Church-wardens, Surveyor or Surveyors of the Highways, and Inhabitants in every Pariſh, ſhall aſſemble together, and the major Part of them as are ſo aſſembled, ſhall make a liſt of the Names of a competent Number of the Inhabitants in their Pariſh, who have an Eſtate in Lands, Tenements, or Hereditaments, in their own Right, or their Wives of the Value of ten Pounds by the Year, or a perſonal Eſtate of the Value of one hundred Pounds, or are Occupiers or Tenants of Houſes, Lands, Tenements or Hereditaments, of the yearly Value of thirty Pounds, if any ſuch there be, or if there be no ſuch Perſons in the Pariſh, then the ſaid Liſt to be of the moſt ſufficient Inhabitants of ſuch Pariſh, and ſhall return ſuch Liſt unto two or more of the Juſtices of the Peace in or near the Diviſion of the County in which the Pariſh lies, at a ſpecial Seſſions to be held for that Purpoſe within the ſaid Diviſion, on the third Day of* January *next following, unleſs it ſhall happen on Sunday, and then to be the fourth of the ſame Month, or within fifteen Days after for which Purpoſe the ſaid Juſtices are required to hold a ſpecial Seſſions at ſome Place within that Diviſion where the Pariſh lies, and to give Notice of the Time and Place where they intend to hold the ſame, to the Conſtables, Headroughs, Tithingmen, Church-wardens, and Surveyors of the Highways of every*

Pariſh within the ſaid Diviſion, at leaſt ten Days before the Holding of the ſaid Seſſions; and the ſaid Juſtices ſhall then and there, out of the ſaid Liſts, according to their Diſcretion, and the Largeneſs of the Pariſh by Warrant under their Hands and Seals, nominate and appoint one, two, or more, as they ſhall think fit, and approve of, being of like Sufficiency as aforeſaid, to be Surveyor or Surveyors of the Highways of every Pariſh within the Diviſion, or for any Hamlet, Precinct, Liberty, Tithing or Town, of and in the ſame Diviſion, for the Year enſuing; which Nomination and Appointment ſhall by the Conſtables, Headboroughs, Tithingmen, or Surveyors of the Highways for the Time being, or ſome of them, be notified to the Perſon or Perſons ſo nominated, choſen, and appointed, by the ſaid Juſtices within ſix Days after ſuch Nomination, by ſerving him or them with the ſaid Warrant or Warrants, or by leaving the ſame, or a true Copy thereof, at his or their Houſes or uſual Places of abode; and from thenceforth the Perſon or Perſons ſo nominated and appointed, ſhall be Surveyor or Surveyors of the Highways, for the Pariſh, Town, Village, Hamlet, Precinct, or Tithing, for which he ſhall have been ſo nominated, choſen, and appointed for the Year enſuing, and ſhall take upon him and them reſpectively and duly execute the ſaid Office according to the former Laws made concerning the Highways, and the ſaid Act; and if the ſaid Perſons ſo nominated and ſerved with the ſaid Warrant ſhall refuſe, or neglect ſo to do, he or they ſo refuſing and neglecting, ſhall forfeit the Sum of five Pounds, to be levied on his or their Goods and Chattels, by Diſtreſs and Sale of the ſame, by Warrant under the Hand and Seal of two or more Juſtices of the Peace of the ſame Diviſion, or in Default thereof any neighbouring Juſtices of the Peace for the ſaid County, which Warrant the ſaid Juſtices are required to make upon Information of any one credible Witneſs upon Oath; the one Moiety of which Forfeiture ſhall go to him that ſhall inform, and the other Moiety for and towards the Repair of the Highways of the ſame Pariſh, rendring the Overplus to the Party whoſe Goods ſhall be diſtrained, the Charges of the Diſtreſs and Sale being firſt deducted; and in Caſe of ſuch Neglect or Refuſal, the ſaid Juſtices are impowered to nominate and appoint ſome other fit Perſon or Perſons to perform the ſaid Office, who upon like Notice of ſuch Nomination and Appointment, ſhall take upon him or them, and duly execute the ſaid Office, and if he or they neglect or refuſe ſo to do, ſhall forfeit the like Sum of five Pounds, to be levied and diſpoſed of as aforeſaid; and if the Conſtables, Headboroughs, Tithingmen, Church-wardens, and Surveyor or Surveyors of the Highways of any Pariſh, Town, Liberty or Precinct, or ſome of them, ſhall not return the ſaid Liſt of Names in ſuch Manner, as in this Act is directed, every of them ſo neglecting, ſhall forfeit the Sum of twenty Shillings, to be levied in the Manner, and imployed to the Uſes aforeſaid.

Sect. 36. And it is farther enacted by the ſaid Statute of 3 & 4 *W. & M.* 12. *That if any Juſtice of the Peace ſhall neglect or refuſe to do what is required of him by the ſaid Act, he ſhall forfeit five Pounds, one Moiety whereof ſhall go to the Perſon that ſhall ſue for the ſame, the other Moiety to be employed in the Repairs of the Highways of the Pariſh where the Perſon who ſhall ſue for the ſame inhabits, to be recovered in any of the King's Courts of Record, by Action of Debt,* &c.

Sect. 37. As to the fifth general Head of this Chapter, *viz.* In what Manner the Surveyors of the Highways ought to execute their Office, it is enacted by the ſaid Statute of 3 & 4 *W. & M.* 12. *That every Surveyor of the Highways, appointed as by the ſaid Act is directed, ſhall within fourteen Days next after the firſt Acceptance of the ſaid Office, and ſo from Time to Time every four Months, during his being Surveyor, take a View of all the Roads, common Highways, Water-Courſes, Bridges, Cauſeys, and Pavements within the Pariſh, Town, Village, Hamlet, Precinct, or Tithing, for which he is appointed*

Surveyor, that are to be repaired by the ſaid Pariſh, &c. *and ſhall make a Preſentment upon Oath, in what State and Condition he finds the ſame, to ſome Juſtices of the Peace of the ſame Diviſion, if then reſident there, otherwiſe to ſome neighbouring Juſtice of the Peace for the ſaid County, and in Default thereof ſhall incur the Penalty aforeſaid, as if he or they had refuſed or neglected to accept and execute the ſaid Office, unleſs he ſhall have ſome reaſonable Excuſe for omitting the ſame, to be allowed of by two Juſtices of the Peace of the ſame Diviſion,* &c. *And what Defaults and Annoyances they ſhall find in any of the ſaid Highways,* &c. *they ſhall from Time to Time the next Sunday immediately after Sermon, give publick Notice of the ſame in the Pariſh Church, and if the ſame ſhall not be removed, repaired, and amended within thirty Days after ſuch Notice given, that then the ſaid Surveyor or Surveyors ſhall within thirty Days remove, repair, and amend the ſame, and diſpoſe of the ſame Annoyances, to and for the Repair of the ſaid Highways; and the ſaid Surveyor or Surveyors ſhall be re-imburſed what Charges and Expences they ſhall be at in ſo doing, by the Parties who ſhould have done the ſame; and in Caſe the ſaid Parties ſhall upon Demand refuſe or neglect to pay the ſaid Surveyors their ſaid Charges, then the ſaid Surveyors ſhall apply themſelves to any Juſtice of the Peace within the Diviſion of the County wherein ſuch Highway is, and in Default thereof to any neighbouring Juſtice for the ſaid County, and upon his or their making Oath before ſuch Juſtice of the Notice to the Defaulter in manner aforeſaid, the ſaid Surveyors ſhall be repaid all ſuch their Charges as ſhall be allowed to be reaſonable by the ſaid Juſtice, to be levied in Manner aforeſaid.*

Sect. 38. Alſo it is enacted by the above mentioned Statute of 22 Car. 2. 12. Par. 12. *That the Surveyors ſhall appoint ſix Days for the providing Stones, Gravel, and other Materials, for the Amendment of, and for working in the Highways, having reſpect to the Seaſon of the Year, and the Weather, and giving Notice publickly ſome convenient Time before the ſeveral Days; at which Days all Perſons liable to the ſaid Work, ſhall attend and work accordingly: And the ſaid Surveyors,* &c. *ſhall make Return of the Defaulters, within one Month after every Default made, to ſome neighbouring Juſtice of the Peace of the ſame County; and the ſaid Juſtice ſhall preſent the ſame at the Quarter-Seſſions of the Peace held next after ſuch Return made unto him; and the Offenders ſhall reſpectively incur the ſame Forfeiture, Pains and Penalties, inflicted and appointed by the Laws then in Force for the Amending of the Highways.*

Salk. 357. And it has been adjudged, That the Juſtices ought to fix the Particular Days, and not generally to appoint ſix Days between ſuch and ſuch a Day.

Sect. 39. It is enacted by 5 *El.* 13. *That it ſhall be lawful for the Surveyors of the Highways, for the better Reparation of the Ways, within their ſeveral Limits (if it ſhall be ſo to them thought neceſſary) to take or carry away of the Rubbiſh or ſmalleſt broken Stones of any Quarry or Quarries lying and being within the Pariſh where they ſhall be Surveyors, without Licence, Controlment, or Impeachment of the Owner, ſo much as by their Diſcretions ſhall be deemed neceſſary for the Amendment of the ſaid Ways: And that for the Fault of any Quarry not being within their ſaid Pariſh or Limits, or in Default of Rubbiſh not to be found in any ſuch Quarry, it ſhall be lawful for every ſuch Surveyor for the Uſe aforeſaid, in the ſeveral Grounds of any Perſon or Perſons being within the Pariſh and Limits where they ſhall be Surveyors, and nigh adjoining to the Way wherein ſuch Reparations ſhall be thought neceſſary to be made, and wherein Gravel, Sand, or Cinders is likely to be found, to dig or cauſe to be digged for Gravel, Sand, or Cinders, and likewiſe to gather Stones lying upon any Lands or Grounds within the Pariſh, and meet to be uſed to ſuch Purpoſe, and thereof to take and carry away ſo much as ſhall be by them thought neceſſary to be employed in the Amendment of the ſaid Highways.*

Sect. 40. But it is provided by the ſaid Statute, Par. 4. *That it ſhall not lawful to any ſuch Surveyor by Virtue of the ſaid Act to cauſe any Rub-h to be digged out of any Quarry or Quarries, but only ſhall extend to ſuch bbiſh as ſhall be found there ready digged by the Owner or Owners of the ſaid arry or Quarries, or otherwiſe by his or their Licence and Commandment; ſhall not extend to give Authority to any Surveyor to dig or cauſe to be ged any Gravel, Sand, or Cinders in the Houſe, Garden, Orchard, or Mea-of any Perſon, nor that it ſhall be lawful to any ſuch Surveyor to cauſe more Pits to be digged for Gravel in any ſeveral and incloſed Ground than only; and that the ſame Pit or Hole ſo digged for Gravel, as is aforeſaid, ll not by any Way be in Breadth or Length, above ten Yards over at the : And that every ſuch Surveyor as ſhall cauſe any ſuch Pit to be made digged for Gravel, Sand, or Cinders, as is aboveſaid, ſhall within one nth next after ſuch Digging or Pit made, cauſe the ſame to be filled and ed up with Earth, at the Coſts and Charges of the Pariſhioners, upon n to forfeit to the Owner or Owners of the Soil wherein any ſuch Pit ſhall ade and digged, for every Default five Marks to be recovered by Action of t, &c.*

ect. 41. And it is farther enacted by the ſame Statute, Par. 6. *That every rviſor ſhall within the Limits where he ſhall be Surveyor, have Autho-to turn a Water-Courſe, or Spring of Water, being in any Highway, into Ditch of the ſeveral Ground of any Perſon whatſoever next adjoining to the Ways, in ſuch Manner as by the ſaid Surveyors ſhall be thought meeteſt.*

ect. 42. Alſo it is enacted by the above mentioned Statute of 18 *El.* 10. 7. *That where any Soil hath been caſt into the common Highway, or com-faring Way, that there is a Bank between the ſaid Way and the Ditch, all be lawful for the ſaid Surveyors, &c. to make Sluices or other Devices heir Diſcretions, to convey the Water out of the ſaid Way into the Ditch; Law, Right, Intereſt, or Uſage, to the contrary notwithſtanding.*

ect. 43. And it is farther enacted by the ſaid Statute of 3 & 4 *W.* & 12. *That it ſhall be lawful for the ſaid Surveyors, where the Ditches and ains already made are not ſufficient to carry of the Water that lies upon the hways, to make new Ditches and Drains in and through the Lands next ining to the ſaid Highways, and keep them ſcoured, cleanſed, and open, come upon any of the Lands with their Workmen for ſo doing.*

ect. 44. Alſo it is enacted by the above mentioned Statute of 5 *El.* 13. 8. *That every Surveyor for the Time being, ſhall within one Month next r Default or Offence made by any Perſon, contrary to the Proviſion and Meaning of either of the ſaid Statutes of* 2 & 3 Ph. & Mar. 8. *or* 5 *El. preſent every ſuch Default or Offence, to the next Juſtice of Peace for Time being, under pain of forty Shillings.*

ect. 45. And it is enacted by the ſaid Statute of 22 *Car.* 2. 12. Par. 1. *t all Conſtables and Surveyors of the Highways, from Time to Time du-their Continuance in their Offices, ſhall cauſe the ſeveral Acts of Parlia-t then in Force, touching the Repairing the Highways, to be put in Execu-, and the Penalties thereby impoſed to be levied and diſpoſed of, as by the ſeveral Act is directed: And every Conſtable or Surveyor of the Highways ſing or neglecting to put the ſaid Acts in Execution, or wilfully ſuffering Waggons or Carts to paſs thro' their reſpective Limits with more Cattle, or ther Manner than by Law is allowed, ſhall incur the like Penalty of forty llings, &c.*

ect. 46. And it is farther enacted by the ſaid Statute of 3 & 4 *W.* & 12. *That the Juſtices of the Peace of every County ſhall in their reſpec-Diviſions once in four Months, hold a ſpecial Seſſions, and ſhall thereunto ſummon*

ſummon all the Surveyors of the Highways within that Diviſion to come before them, and ſhall give them a Charge to do their Duty, and declare to them what they are obliged to do by Virtue of that, or any former Act; after which the ſaid Surveyors ſhall make a Preſentment unto them upon Oath, of the State and Condition of the Highways within their reſpective Pariſhes, Towns, Hamlets, &c. and what Offences and Neglects any are guilty of, contrary to the Meaning of any Statute made concerning the Highways, or any Thing relating thereunto: And before any ſuch Surveyor ſhall go out of, or be diſcharged from his Office, he ſhall at ſome ſuch ſpecial Seſſions, give an Account upon Oath of all Money that hath come to his Hands, which ought to be employed in amending of the Highways, and how he hath diſpoſed of the ſame; and in caſe any Moneys ſhall remain in his Hands, he ſhall deliver the ſame to the Surveyors of the Highways, that ſhall ſerve for the ſame Pariſh, Town, or Hamlet, &c. for the Year enſuing, and in caſe of Failure, to forfeit the double Value of what ſhall be adjudged to be in his Hands, by the ſaid Juſtices, &c.

Sect. 47. And it is enacted by 6 *Annæ*, 29. *That if any Surveyor ſhall neglect to put either that or any former Law for repairing Highways in Execution, he ſhall forfeit five Pounds, to be levied by Diſtreſs, &c. by Warrant of one Juſtice of the Peace.*

As to the ſixth general Head of this Chapter, *viz.* What ſhall be ſaid to be a Nuſance to the Highway, I ſhall conſider:

1. What ſhall be ſaid to be ſuch a Nuſance at Common Law.
2. What by Statute.

Kitch. 34, 35. *Sect.* 48. As to the firſt Point, there is no Doubt but that all Injuries whatſoever to any Highway, as by digging a Ditch, or making a Hedge overthwart it, or laying Logs of Timber in it, or by doing any other Act which will render it leſs commodious to the King's People, are publick Nuſances at Common Law.

2 Rol. Ab. 137. B. 265. c. 2. *Sect.* 49. Alſo it ſeemeth to be clear, That it is no Excuſe for one who layeth ſuch Logs in the Highway that he laid them only here and there, that the People might have a Paſſage by Windings and Turnings through the Logs: Yet it is ſaid to be no Nuſance for the Inhabitants of a Town to unlade Billets, *&c.* in the Street before their Houſes, by reaſon of the Neceſſity of the Caſe, unleſs they ſuffer them to continue there an unreaſonable Time after they are unloaded.

2 Rol. Ab. 137. B. 2, 3.

Sect. 50. There is no Doubt but that it is a Nuſance at Common Law to erect a new Gate in a Highway, as hath been more fully ſhewn in the precedent Chapter; alſo it ſeemeth clear, That it is a like Nuſance to ſuffer the Ditches adjoining to a Highway, to be foul, by reaſon whereof it is impaired, or to ſuffer the Boughs of Trees growing near the Highway to hang over the Road in ſuch a Manner as thereby to incommode the Paſſage.

8 H. 7. 5. a. Kitch. 34, 35. 8 H. 7. 5. b.

Sect. 51. As to the ſecond Point, *viz.* What ſhall be ſaid to be a Nuſance to the Highway by Statute; not only all the above mentioned Nuſances, which are ſuch at Common Law, are eſteemed alſo Nuſances by Statute, but there is alſo one particular Nuſance which is made ſuch by Statute and doth not ſeem to be taken Notice of by Common Law, and that is the Drawing of a travelling Carriage with more than ſix Horſes in Length. Permitting whereof hath occaſioned the Carrying of ſuch exceſſive Loads in ſuch Carriage, that the Weight thereof hath in many Places rendred the Roads unpaſſable.

5 Geo. 1. 12.

to the ſeventh general Head of this Chapter, *viz.* How ſuch Nuſances are to be removed and puniſhed, I ſhall conſider the following Particulars:

1. In what Order Hedges and Ditches, adjoining to the Highway, ought to be kept.
2. How far all Trees and Buſhes are to be removed from the Highway.
3. In what Manner all other Annoyances obſtructing the Highway are to be removed.
4. How far all Perſons are puniſhable for taking away Things made uſe of for the Benefit of the Highway.
5. How far they may be puniſhed for drawing a Carriage with more than five Horſes in Length.

Sect. 52. As to the firſt Particular, *viz.* In what Order Hedges and ches, adjoining to the Highway, ought to be kept; it is ſaid, That he o hath Lands next adjoining to a Highway, is bound of common Right cowr his Ditches; but it is ſaid, That he who hath Lands next adjoin- to ſuch Lands, is not bound by the Common Law ſo to do, without e ſpecial Preſcription for that Purpoſe; and perhaps it is the better Opi- n, That he who hath Trees next adjoining to the Highway, and hang- over it to the Annoyance of the People, is bound by the Common Law op the ſame; and it ſeems clear, That any Perſon may juſtify the Lop- ſuch Trees, ſo far as to avoid the Nuſance. 8 H. 7. 5. a.b. Kitch. 34, 35. Dal. ca. 26. H. P. C. 144. 8 H. 7. 5. a.b.

Sect. 53. However it is enacted by 5 *El.* 13. Par. 7. *That the Hays, ces, Dykes, or Hedges, next adjoining on either Side, to any High or Com- faring Way, ſhall from Time to Time be dyked, ſcowered, repaired, and low, by the Owner or Owners of the Ground or Soil, which ſhall be in- ed with the ſaid Hays, Fences, Dykes, or Hedges aforeſaid,* &c.

Sect. 54. And it is farther enacted by 18 *El.* 10. Par. 5. *That whoever ll not repair, ditch, or ſcowr, any Hays, Fences, Ditches, or Hedges ad- ing to any Highway, or Common faring Way, according to the true In- of the above mentioned Statute of* 5 El. 13. *ſhall forfeit for every ſuch ence ten Shillings, to be levied by the Surveyors,* &c.

Sect. 55. And it is farther enacted by 3 & 4 *W. & M.* 12. *If any Owner Occupier of Lands next adjoining to any Highway, not twenty Foot broad, ll neglect to cleanſe or ſcowr their Ditches, Gutters and Drains, adjoining he ſaid Highways, or cauſe the Earth taken out thereof to be carried a- , and lay ſufficient Trunks, Tunnels or Bridges, where any Cartways are, the ſaid Grounds, for the Space of ten Days after Notice thereof given a Surveyor,* &c. *every ſuch Offender ſhall forfeit five Shillings,* &c.

Sect. 56. And it is farther enacted by the ſaid Statute of 3 & 4 *W. & M. That the Poſſeſſors of the Land next adjoining to any Highways, where are not twenty Foot broad, ſhall from Time to Time, and at all Times, keep ir Hedges plaſht, cut, or pruned, ſo as no Tree, Buſh, or ſhard, ſhall ſtand grow in ſuch Highway, nor Bough or Branch be ſuffered to hang over the e, or any Part thereof; but the ſaid Hedges ſhall be kept cut and pared ht up from the Roots, and not permitted in any ſort to ſpread into or hang over Highway, or any Part thereof, to the End that there may be a free and clear ſſage for the Travellers, and all Sorts of Carriages loaden, without being any s prejudiced or obſtructed by any Hedges, Trees, Boughs, or Branches what-*

 ſoever,

ſoever, and that the Sun may freely ſhine into the ſaid Ways, to dry and a- mend the ſame.

Sect. 57. Alſo it is farther enacted by the above mentioned Statute of 1 *El.* 10. Par. 6. *That every Occupier of Lands adjoining to the Grounds adjoin- ing to any Highway, or common faring Way, where any Ditching or Scowring ſhould or ought to be, as aforeſaid, ſhall from Time to Time, as Need ſhall re- quire, ditch and ſcowr in his Grounds ſo adjoining, whereby the Water conveyed from the ſaid Highway,* &c. *over the Ground next adjoining, may have Pa- ſſage over ſuch next Ground ſo adjoining, on Pain of Forfeiture for every Time ſo offending for every Rod not ſo ditched and ſcowred, twelve Pence.*

Sect. 58. As to the ſecond Particular, *viz.* How far all Trees and Buſhes are to be removed from the Highway, it appears from the above mentioned Statute of *Wincheſter*, Chapter 5. *That no ſmall Tree or Buſh, whereby a Man may lurk to do hurt, ought to be ſuffered to ſtand within two hundred Foot on either Side of a Highway leading from one Market-Town to another.*

Sect. 59. And it is farther enacted by the ſaid Statute of 5 *El.* 13. Par. *That all Trees and Buſhes growing in the Highways, ſhall be cut down by the Owner or Owners of the Ground or Soil,* &c. And it is alſo enacted by the ſaid Statute of 18 *El.* 10. Par. 7. *That whoever ſhall not cut down, or be- low all Trees and Buſhes, growing in or next adjoining to any the ſaid Ways according to the Intent of the above mentioned Statute of* 5 El. 13. *ſhall for- feit ten Shillings.*

Sect. 60. Alſo it is enacted by the ſaid Statute of 3 & 4 *W. & M.* 12. *That no Tree, Buſh, or Shrub ſhall be permitted to ſtand or grow in any Highway not full twenty Foot broad, but the ſame ſhall be cut down, grubbed up, and carried away by the Owner or Owners of the Land or Soil, where the ſame ſhall ſtand or grow, within ten Days after Notice to him or them given by the ſaid Surveyors, or any of them, on Pain to forfeit for every Neglect five Shillings,* &c.

Sect. 61. As to the third Particular, *viz.* In what Manner all other Annoyances obſtructing the Highway are to be removed; it ſeems clear

1 Jon. 222. That by the Common Law any one may abate a Nuſance to a Highway and remove the Materials, but not convert them to his own Uſe, as has more fully been ſhewn in the precedent Chapter; alſo it ſeemeth, That

Vide 4 Aſſ. 3. 17 Ed. 3. 9. b. 2 Rol. Ab. 137. B. 4. 142. K, L. Heir may be indicted for continuing an Incroachment, or other Nuſance in a Highway, begun by his Anceſtor, becauſe ſuch a Continuance thereof amounts in the Judgment of Law to a new Nuſance.

Sect. 62. But the Common Law, not having been thought ſufficient to have provided againſt Miſchiefs of that Kind, it was enacted by the above mentioned Statute of 18 *El.* 10. Par. 7. *That no Perſon, having any Ground adjoining to any Highway, or Common faring Way, leading to any Market Town, ſhall caſt or ſcowr any Ditch, and throw or lay the Soil thereof into the Highway, and ſuffer it to lie there by the Space of ſix Months, to the Annoy- ance of the ſaid Highway, or Common faring Way, upon Pain of Forfeiture for every Load of Soil ſo caſt into the Highway, or Common faring Way, by Ditching or Scowring, twelve Pence: And that the Surveyors may make Sluces thro' Banks occaſioned by the caſting ſuch Soil into any Highway,* &c.

Sect. 63. And it is farther enacted by the above mentioned Statute of 3 & 4 *W. & M.* 12. *That no Perſon ſhall lay in any Highway not twenty Foot broad, any Stone, Timber, Straw, Dung, or other Matter, whereby the ſame may be any ways obſtructed or annoyed, on Pain to forfeit for every ſuch Offence five Shillings,* &c. And it is farther enacted, *That if any Timber, Stone, Straw, Stubble, or other Matter for the making of Dung, or on any other*

ence whatſoever, *ſhall be laid in any Highway, as aforeſaid, whereby the ſame* hall be any ways obſtructed or annoyed, *the Owners or Poſſeſſors of the Lands* ext adjoining to the ſame, *ſhall clear the ſaid Way by removing the ſaid Tim-* er, Stone, Hay, Straw, Dung, *or other Matter, and have, take, and diſpoſe* f the ſame to his and their own Uſe; *and if any ſuch Owner or Occupier of* ands next adjoining to the ſaid Highways, *ſhall neglect to clear the ſaid* Vays of the ſaid Nuſances, *he ſhall forfeit five Shillings*, &c.

Sect. 64. As to the fourth Particular, *viz.* How far all Perſons are puniſhable for taking away Things made Uſe of for the Benefit of Highways, it is enacted by the above mentioned Statute of 7 & 8 *W.* 3. 29. *That very Perſon who ſhall pull up, cut down, or remove, any Poſt, Block, great* tone, Bank of Earth, *or other Security, which was ſet up, placed, and* ade, *for ſecuring any Horſe or Foot Cauſey, in a publick Highway, from* Vaggons, Wains and Carts, *ſhall upon Complaint to any Juſtice of the Peace* f the Place *or Diviſion where ſuch Offence ſhall be proved by the Oath of* e credible Witneſs, &c. *forfeit twenty Shillings, one Moiety thereof to the* urveyors, &c. *and the other Moiety to him that ſhall diſcover the ſame.*

Sect. 65. As to the fifth Particular, *viz.* How far Perſons may be puniſhed r drawing a Carriage with more than five Horſes in Length, it is enacted the above mentioned Statutes of 22 *Car.* 2. 12. Par. 6, 7. and 7 & 8 *Will.* 29. and alſo by 6 *Annæ*, 29. and 9 *Annæ*, 18. and 1 *Geo.* 1. *c.* 11. *That travelling Waggon, Wain, Cart, or Carriage, wherein any Burdens, Goods* d Wares *ſhall be carried and drawn (other than ſuch Carts and Carriages as* all be imployed *in or about Huſbandry and Manuring of Land, and in carry-* g *of Hay, Straw, Corn*[a] *unthraſhed, Chalk, Timber for Shipping, Materials* r Building, *Stones of all Sorts, or ſuch Ammunition or Artillery as ſhould be* r the Service *of his Majeſty, his Heirs or Succeſſors) ſhall at any one Time be* awn or go *in any common or publick Highway or Road, with above five* orſes, Oxen, *or Beaſts in Length, (except*[b] *only where ſuch five Horſes ſhall* t be ſufficient *to draw ſuch Cart or Waggon up any ſteep Hill, or out of any* ul Place, *in which Caſe it ſhall be lawful to join any Horſes from another* rt *or Waggon then travelling that Road, with the Conſent of the Owner or* river *of ſuch Cart or Waggon, to help ſuch inſufficient Horſes up ſuch ſteep* ill, *or out of ſuch foul Place) on Pain of*[c] *forfeiting five Pounds, one Moiety* the Surveyor *of the Highways of the Place where ſuch Offence ſhall be commit-* d, *for the Repairs of the ſaid Highways, and the other Moiety to him who ſhall* ſcover *and proſecute for the ſame, to be levied by Diſtreſs of all, or any of* Horſes, Oxen, *or Beaſts af any Perſon offending againſt the ſaid Statutes,* hich[d] *Diſtreſs may be made by any Perſon whatſoever*, (without any Warrant, it ſeemeth from 9 *Annæ*, 18.) *And the Beaſts ſo diſtrained are to be deli-* red *forthwith to the Surveyor of the Highways, or other Pariſh Officer, of* Place *where the Offence ſhall be committed; and if the ſaid Penalty be not paid* thin three Days, *the ſaid Surveyor or other Pariſh Officer, may, by Warrant* one Juſtice *of the Peace, ſell the ſaid Diſtreſs, and deliver the Money raiſed* reby *to the ſaid Juſtice, who is to diſtribute the Penalties in the Manner* ove directed, *rendring the Overplus to the Owner, the Charges being firſt de-* ted; *or if the Offender ſhall immediately pay the ſaid Penalty to the Perſon* o ſhall make *ſuch Diſtreſs, or to the Surveyor, or other Pariſh Officer, where* Offence *ſhall be committed; then the Perſon ſo receiving the ſame, ſhall deli-* r it *to the next Juſtice of the Peace, to be by him diſtributed, as aforeſaid.* rovided *that if any Perſon ſhall refuſe or neglect to carry any of the ſaid Beaſts* him *ſo diſtrained, to the Surveyor, or other Pariſh Officer, as aforeſaid, he* ll forfeit *twenty Pounds, to be levied of his Goods by Warrant of one Juſtice* the Peace, &c. *And if any Surveyor, or other Pariſh Officer, ſhall refuſe or neglect*

See the Statute of 5 Geo. 1. c. 12.

[a] 1 Geo. 1. Stat. 2. c. 11.

[b] 6 Annæ, 29. 9 Annæ, 18.

[c] 6 Annæ, 29.

[d] 9 Annæ, 18.

neglect to deliver any Sum of Money, or Penalty by him received, to the ſaid Juſtice, he ſhall forfeit twenty Pounds to be levied, &c. *as aforeſaid.* Additions [87]

Sect. 66. And it is farther enacted by the ſaid Statute of 9 *Annæ*, 18. *That if any Perſon employed by any Carrier, or other Perſon ſubject to the Penalties mentioned in the ſaid Act, ſhall drive, or aſſiſt in the Driving of any travelling Waggon,* &c. *with more than ſix Horſes,* &c. *the Perſon ſo offending ſhall forfeit five Pounds, to be levied and diſpoſed of in like Manner as the Forfeitures before mentioned are directed and appointed.*

Sect. 67. As to the eighth general Head of this Chapter, *viz.* In what Manner thoſe, who are charged with any Offence relating to the Highway, are to be proceeded againſt, it is enacted by the above mentioned Statute of 2 & 3 *Ph. & M.* 8. *That the Steward of every Leet may enquire by the Oaths of the Suitors of all Offences which ſhall be committed within the Leet, againſt every Article of the ſaid Statute, and to aſſeſs ſuch Fines and Amerciaments for the ſame, as ſhall be thought meet by the ſaid Steward: And in Default of ſuch Inquiry or Preſentment, the Quarter-Seſſions of every Place may inquire of the ſame Offences which ſhall be committed within the Limits of their Commiſſion, and to aſſeſs ſuch Fines as they, or two of them, whereof one to be of the* Quorum, *ſhall think meet: And the Steward of the every Leet ſhall make Eſtreats indented of all the Fines, Forfeitures, and Amerciaments, for the Defaults preſented before him, and ſhall deliver the one Part thereof ſealed and ſigned by him to the Bailiff and High Conſtable of every Hundred, Rape, Lathe, or Wapentake, wherein the Default ſhall be preſented, and the other Part to the Conſtable and Church-wardens of the Pariſh wherein the Defaults were made; the ſame to be yearly delivered within ſix Weeks after the Feaſt of* Michaelmas: *And the Clerk of the Peace ſhall make the like Eſtreats indented of the Fines,* &c. *for the Defaults preſented before the Juſtices of the Peace,* &c. *The which Eſtreats ſhall be ſufficient Warrant to the ſaid Bailiff, or chief Conſtable, to levy the ſaid Fines,* &c. *by Way of Diſtreſs: And if no ſufficient Diſtreſs can be found by the ſaid Bailiff or Chief Conſtable; or if the ſaid Offender ſhall obſtinately refuſe to pay the ſaid Fine,* &c. *and do not pay the ſame within twenty Days after a lawful Demand of the ſame by the ſaid Officer, he ſhall forfeit the double Sum that he ſhould before have paid.*

Sect. 68. And it is farther enacted by the ſaid Statute, *That every of the ſaid Bailiffs and Head Conſtables, ſhall at leaſt once every Year, between the firſt Day of* March *and the laſt Day of* April, *make a true Account and Payment of all ſuch Sums of Money, (to the Conſtable and Church-wardens of every Pariſh wherein the Offences were committed, or to two of them) as he ſhall have collected upon any of the ſaid Eſtates, on Pain of, to forfeit for every Time he ſhall not ſo do, forty Shillings.*

Sect. 69. And it is farther enacted by the ſaid Statute, *That all Fines,* &c. *which ſhall be due for any Offence againſt the Purview thereof, ſhall be to the Church-wardens of every Pariſh wherein the Offences ſhall be committed, to be beſtowed on the Highways in the ſaid Pariſhes: And the ſaid Church-wardens ſhall have Authority to call the ſaid Bailiff and Head Conſtable to account, before the Juſtices of Peace, or two of them, whereof one to be of the* Quorum, *by Bill, Information, or otherwiſe: The which Juſtices ſhall have Authority to take the ſaid Account, and to commit the ſaid Bailiff and Head Conſtable to Priſon till they ſhall pay all ſuch Arrearages as ſhall be adjudged by the ſaid Juſtices; and every of the ſaid Bailiffs and Head Conſtables upon their Accounts ſhall have allowed for every Pound he ſhall collect and pay, Eight-pence for his own Pains, and Twelve-pence for the Fees of the Clerk of the Peace, or Steward of the Leet, for the Eſtreats indented of every ſeveral Pariſh that they ſhall deliver as is aforeſaid.*

And the Succeſſors of every Church-warden ſhall have the like Action of Account againſt their Predeceſſors, as is before appointed againſt the Bailiff.

Sect. 70. And it is enacted by the above mentioned Statute of 5 *El.* 13. Par. 8. *That every Surveyor ſhall within one Month after any Default or Offence againſt the ſaid Statute of* 2 & 3 Ph. & Mar. 8. *or the ſaid Statute of* 5 El. 13. *preſent every ſuch Offence to the next Juſtice of Peace, on Pain to forfeit for every ſuch Offence in ſuch Sort, not by him preſented, forty Shillings: And that every ſuch Juſtice of Peace to whom any ſuch Offence ſhall be ſo preſented, ſhall certify the ſame Preſentment at the next general County Seſſions, on Pain to forfeit for not certifying of every ſuch Preſentment of every ſuch Offence, five Pounds; and that the Juſtices of Peace of every County, where the ſaid Offences ſhall be committed, may enquire thereof at their Quarter-Seſſions, and aſſeſs ſuch Fines for the ſame, as they or two of them, whereof one to be of the* Quorum *ſhall think meet.*

Sect. 71. And it is farther enacted by the ſaid Statute, Par. 9. *That every Juſtice of Peace may of his own proper Knowledge, in the open General-Seſſions, make Preſentment of any Highway not well and ſufficiently repaired and amended, or of any other Default or Offence, contrary to either of the ſaid Statutes of* 2 & 3 Ph. & Mar. 8. *or* 5 El. 18. *And that every Preſentment made by any ſuch Juſtice of Peace upon his own Knowledge, as is aforeſaid, ſhall be as good, and of the ſame Force, Strength, and Effect in the Law, as if the ſame had been preſented, found, and adjudged, by the Oath of twelve Men: And that for every ſuch Default ſo preſented, as is aforeſaid, the Juſtices of Peace of the ſaid County ſhall immediately, at the ſaid General-Seſſions, have Authority to aſſeſs ſuch Fines, as to them, or two of them, whereof the one to be of the* Quorum, *ſhall be thought meet: Saving to every Perſon that ſhall be touched by any ſuch Preſentment his lawful Traverſe to the ſame Preſentment, as he might have upon any Indictment of Treſpaſs, or forcible Entry, by the Laws of this Realm, before the making of this Statute.*

Sect. 72. It hath been holden in the Expoſition of this Clauſe, That the Party againſt whom ſuch a Preſentment ſhall be made, cannot take any Traverſe to the Want of Repair of ſuch Highway; but it is agreed, That he may plead that ſome other Perſon ought to repair the ſame, and traverſe his own Obligation to do it. Neither can I ſee upon what Reaſon the former Opinion is grounded, that he cannot traverſe the Want of Repair of ſuch Highway, for ſince the Statute expreſly *ſaves to every Perſon who ſhall be touched by any ſuch Preſentment, his lawful Traverſe to the ſame, as he might have to an Indictment of Treſpaſs or forcible Entry*; and ſince it ſeems clear, That every Defendant to any ſuch Indictment may traverſe the whole Matter alledged againſt him, as hath been ſhewn more at large, Chap. 64. Sect. 58. why may he not as well have the ſame Benefit in the preſent Caſe? And though the Record of a Juſtice of Peace acting by Force of any Statute, as a Judge, be not traverſable; yet it ſeems hard by ſuch a general Rule, to make any Record not traverſable, which by the expreſs Words of the Statute, which authorizes the making of it, is allowed to be traverſable: It is true indeed, That a Preſentment in a Court-Leet is not traverſable, unleſs it touch the Party's Freehold: But I do not ſee why ſuch a Preſentment in Purſuance of this Statute ſhould have the like Privilege ſince the Statute hath no Mention of ſuch Preſentments in Courts-Leet, but gives the like Traverſe as is allowed by Law upon any Indictment of Treſpaſs, *&c.*

Kellew. 34. Crom. 131. Dalt. ca. 26.

See Carth. 212, 213. Supra, ch. 64. Sect. 18.

5 H. 7. 4. a. Dy. 13. b.

Sect. 73. It is farther enacted by the ſaid Statute of 5 *El.* 13. Par. 10. *That all ſuch Fines,* &c. *to be aſſeſſed by the ſaid General-Seſſions, ſhall be eſtreat-*

ed and levied in ſuch Manner, and imployed to ſuch Uſes and Intents, as in the ſaid Statute of 2 & 3 Phil. & Mar. *are appointed.*

Sect. 74. And it is farther enacted by the above mentioned Statute of 18 *El.* 10. Par. 8. *That all Juſtices of Aſſize, Juſtices of Oyer and Terminer, and Juſtices of the Peace in their Seſſions, and Stewards of Leets in their Leets, ſhall hear and determine every Offence, Matter, and Cauſe, that ſhall grow, come, or riſe, by Reaſon of the ſaid Statute.*

Sect. 75. Alſo it is enacted by the above mentioned Statute of 22 *Car.* 2. 12. Par. 9. *That if any Perſon ſhall fail in his reſpective Days Labour in every Year towards the Repairing of the Highways, or neglect to ſend his reſpective Carriages,* &c. *required by Law; the Surveyors ought to make Complaint thereof to the next Juſtices of the Peace, who ought upon Proof by Oath of one credible Witneſs, to levy by Diſtreſs and Sale of Goods,* &c. *for every Day-Labourer failing, as is aforeſaid, one Shilling and ſix Pence; for every Man and Horſe, that ſhall make Default three Shillings; and for every Cart with two Men, ten Shilling for every reſpective Day wherein they ſhall make Default; which Penalties ſhall be imployed towards the Repairs of the Highways,* &c.

Sect. 76. And it is farther enacted by the ſame Statute, Par. 10. and 3 & 4 *Will. & Mar.* 12. *That the Aſſeſſments to be made, in Purſuance of theſe Statutes, for the Repairs of the Highways, ſhall be levied by Diſtreſs and Sale of the Goods of every Perſon ſo aſſeſſed, not paying the ſame within ten Days after Demand, rendring the Overplus to the Owner the neceſſary Charges being firſt deducted.*

Sect. 77. It will be needleſs to ſhew in this Place in what Manner the ſeveral Penalties for other Offences againſt the above mentioned Statutes concerning the Highways, are to be recovered, becauſe the ſame may appear from the foregoing Part of this Chapter, wherein the ſeveral Clauſes of the ſaid Statutes relating to the ſaid Offences are ſet forth.

Sect. 78. It is enacted by the ſaid Statute of 22 *Car.* 2. 12. Par. 4. *That all Defects of Repairs of Cauſeys, Pavements, Highways or Bridges, ſhall be preſented in the County only where ſuch Cauſeys,* &c. *lie, and not elſewhere; and that no ſuch Preſentment or Indictment ſhall be removed by* Certiorari, *or otherwiſe, out of the ſaid County, till ſuch Indictment or Preſentment be traverſed, and Judgment thereupon given.*

See B. 2. Ch. 27. S. 37, 46, 47.

Sect. 79. And it is farther enacted by the ſaid Statute of 3 & 4 *W. & M.* 12. *That all Matters concerning Highways, Cauſeys, Pavements, and Bridges, mentioned in the ſaid Act, ſhall be determined in the County where the ſame do lie, and not elſewhere; and that no Preſentment, Indictment, or Order, made by Virtue of the ſaid Act, ſhall be removed by* Certiorari *out of the ſaid County into any other Court.*

Sect. 80. Yet it hath been reſolved, That if the Quarter-Seſſions, under Pretence of the Juriſdiction given them by theſe Statutes, take upon them to do a Thing manifeſtly exceeding their Authority, as to make an Order on Surveyors of the Highways to make up their Accounts before a ſpecial Seſſions, their Proceedings may be removed by *Certiorari* into the King's Bench, and there quaſhed; for the Quarter-Seſſions have no manner of Power given them to intermeddle originally with ſuch Accounts, but only by Way of Appeal.

Queen and Bramby, Mic. 10 Ann.

Sect. 81. It is enacted by the ſaid Statute of 3 & 4 *W. & M.* 12. *That no Perſon ſhall be puniſhed for any Offence againſt the ſaid Act, unleſs ſuch Offender be proſecuted for the ſame within ſix Months after the Offence committed, and that no Perſon who ſhall be puniſhed for any Offence by Virtue of the ſaid Act, ſhall be puniſhed for the ſame Offence by Virtue of any other Act, or Law whatſoever.*

ect. 82. As to the ninth general Head of this Chapter, *viz.* In what ner Perſons proceeded againſt for any of the abovementioned Offences defend themſelves; it is enacted by the ſaid Statute of 3 & 4 *W. & M.* *That if any Perſon ſhall find himſelf aggrieved with an Aſſeſſment or , or other Act by the ſaid Juſtices of Peace, the general Quarter-Seſ- of the Peace, may take ſuch Order therein, as to them ſhall be thought enient, and the ſame to conclude and bind all the ſaid Parties.*

ect. 83. Alſo it ſeems to be implied in the Conſtruction of theſe as as of all other Penal Statutes, That no one ought to be convicted of Offence againſt them, without having Notice of the Accuſation made ſt him, and an Opportunity of defending himſelf. And therefore I take it for granted, that generally no one ought to be puniſhed for of the above mentioned Offences, without being called upon to er for himſelf, and having Liberty to traverſe the Matters alledged ſt him; it is true indeed, That it is generally holden, That no Tra- can be taken againſt a Preſentment by a Juſtice of Peace of his own vledge, as to the Want of Repair; yet this Opinion ſeems juſtly que- ble for the Reaſons alledged in the ſeventy-ſecond Section of this er.

Vide ſupra, Ch. 64. Sect. 58, 59, 60.

. 84. However it is certain, That in all other Caſes, whoever is in- or preſented in any Court, except a Court-Leet, for any Offence re- to the Highways, may traverſe the whole Matter alledged againſt ſuch Indictment or Preſentment; but it ſeemeth to be agreed, That ho is preſented for ſuch an Offence in a Court-Leet, can only traverſe ar as it concerns his Freehold, as by charging him with being bound Repairs in reſpect of the Tenure of his Lands, &c. for which Purpoſe ertain, that he may remove it by a *Certiorari* into the King's Bench, ere traverſe it; alſo there is no Doubt, but that after Conviction, or Demurrer, or Confeſſion, any one may take Exceptions to any ſuch ment or Preſentment in any Court for the Want of legal Form; but urt in Diſcretion will very rarely ſuffer a Man to take ſuch Excep- before ſuch Conviction or Confeſſion, without a Certificate and Affi- that the Ways are in good Repair.

5 H. 7. 4. a. Dy. 14. Pl. 64. Finch 386.

And. 234. 1 Keb. 256, 291, 829. 2 Keb. 715, 728.

. 85. Therefore for the better Underſtanding in what Caſes it may to demur to, or confeſs an Indictment or Preſentment of this Kind, I y down the following Rules concerning them.

. 86. I. That it is [a] ſafeſt in every ſuch Indictment to ſhew both ace from which, and alſo the Place to which the Way ſuppoſed to of Repair doth lead, yet Exceptions for Want of ſuch Certainty, metimes been [b] diſallowed; however it ſeems certain, That there is no ity to ſhew [c] that a Highway leads to a Market-Town, becauſe every ay leads from Town to Town.

[a] 2 Rol. Ab. 81. Pl. 18. Palm. 420. [b] 2 Keb. 715, 728. 3 Keb. 89, 644. 1 Brown 6. [c] Palm. 389. 2 Ro. Re. 412.

. 87. II. That it is neceſſary [d] in every ſuch Indictment expreſly to n what Place the Nuſance complained of was done, for which [e] Cauſe ictment for ſtopping a Way at *D.* leading from *D.* to *C.* is not good, s impoſſible that a Way leading from *D.* ſhould be in *D.* and no Place is alledged.

[d] 3 Keb. 644. [e] 2 Rol. Ab. 81. Pl. 18.

. 88. III. That every ſuch Indictment ought alſo certainly to to what Part of the Highway the Nuſance did extend, as by ſhew- w many Foot in Length, and how many Foot in Breadth it con- or otherwiſe the Defendant will neither know of the Certainty of harge, againſt which he is to make his Defence, neither will the be able from the Record to judge of the Greatneſs of the Offence, r to aſſeſs a Fine anſwerable thereunto; and upon this Ground it hath

Cro. Ja. 324.

2 Rol. Ab. 80. Pl. 14, 81. Pl. 16.

hath been adjudged, That an indictment for ſtopping a certain Part of the King's Way at *K.* is naught, for the Uncertainty thereof: Alſo it hath been reſolved, That the Place wherein ſuch a Nuſance is alledged, is not ſufficiently aſcertained in ſuch an Indictment, by ſhewing that it contained ſo many Foot in Length, and ſo many in Breadth, by Eſtimation.

2 Rol. Ab. 81. Pl. 7.

Sect. 89. IV. That every ſuch Indictment muſt ſhew, That the Way wherein a Nuſance is alledged, is a Way common to all the King's People, for which cauſe it hath been reſolved, That an Indictment for a Nuſance to a [a] Horſe-way, without adding that it is a Highway, is naught; and upon the ſame Ground it ſeemeth alſo, That an Indictment for a Nuſance to a common Foot-way to the Church of *D.* for [b] all the Pariſhioners of *D.* is not good; yet it [c] ſeems, That if thoſe laſt Words, *viz. For the Pariſhioners of* D. had been omitted, ſuch an Indictment might be maintained.

Sal. 359. 6 Mod. 255, 256.
[a] Cro. El. 63.
[b] See 2 R. A. 83. C. 1 Vent. 208. Poph. 206. 2 Keb. 728.
[c] 1 Vent. 208. 3 Keb. 28.

Sect. 90. V. That it is not ſafe in an Indictment againſt a common Perſon for not repairing a Highway, which he ought to have done in Reſpect of the Tenure of certain Lands, barely to ſay that he was bound to repair it, *ratione Tenuræ Terræ*, without adding [d] *ſuæ*; alſo it is ſaid, That in an Indictment againſt a [e] Biſhop, *&c.* for not repairing a Highway, in reſpect of certain Lands, it ought to be ſhewn in what Capacity he ought to repair it, becauſe otherwiſe it cannot be known in what Capacity the Proceſs is to be awarded againſt him.

[d] Noy 93. 3 Keb. 855. But the contrary was adjudged Paſch. 5 Geo. 1. between the King and Corrack, according to Ventr. 331. Vide 2 Keb. 514. Raym. 182.
[e] 3 Keb. 58.

Sect. 91. VI. That in every ſuch Indictment the Fact alledged against the Defendant muſt be expreſſed in ſuch proper Terms, that it may clearly appear to the Court to have been a Nuſance; and for this Cauſe it hath been reſolved, That a Preſentment for diverting a Highway is not good, becauſe a Highway cannot be diverted, but muſt always continue in the ſame Place where it was, howſoever it be obſtructed, and a new Way made in another Place.

1 And. 234. Poph. 206.

Sect. 92. VII. That an Indictment againſt a Man for ſtopping a Highway in his own Land is good, without laying the Offence done *Vi & armis*. Alſo it is ſaid, That a Preſentment that a Highway in ſuch a Place decayed by the Defaults of the Inhabitants of ſuch a Town is good without naming any Perſon in Certainty. But it hath been adjudged, That an Indictment againſt particular Perſons muſt ſpecially charge them every one; for which Cauſe it hath been reſolved, That an Indictment againſt ſeveral for not repairing their Streets, that they *& eorum uterque*, did not repair them, is not good.

2 R. A. 79. L.

2 R. A. 81. Pl. 6, 7.

Sect. 93. VIII. That the Defendants ought not to plead *quod non debent reparare*, without ſhewing who ought.

1 Syd. 140. Carth. 213.

Sect. 94. That the Defendants ſhall not be diſcharged by ſubmitting to a Fine, but a *Diſtringas* ſhall go *in infinitum* till they repair. [88]

Salk. 358. 6 Mod. 163.

CHAP. LXXVII.

Of Nuſances relating to Bridges.

AND now I am in the ſecond Place to conſider Nuſances relating to Bridges in particular; for the better Underſtanding whereof, I ſhall examine:

1. How publick Bridges are to be repaired by the Common Law.
2. How by the Statute.

As to the firſt Point, I ſhall conſider,

1. In what Manner, and by whom ſuch Bridges are to be repaired by Common Law.
2. In what Manner Perſons bound to ſuch Repairs are to be proceeded againſt.

Sect. 1. As to the firſt of theſe Particulars, it ſeemeth to be clear, at thoſe who are bound to repair ſuch Bridges, muſt make them of h Height and Strength, as ſhall be anſwerable to the Courſe of the ater, whether it continue in the old Chanel, or make a new one; and t they are not puniſhable as Treſpaſſers, for entring on any adjoining nd, for ſuch Purpoſe, or for laying thereon the Materials requiſite for h Repairs. Alſo it ſeemeth to be clearly [a] ſettled, That of common ght the Charge of repairing all common Bridges, lies upon the County erein they are, unleſs Part thereof be within a Franchiſe; in which ſe it is ſaid, That ſo much as is within the Franchiſe ſhall be repaired by ſe of the Franchiſe.

43 Aſſ. Pl. 43. Dalt. ca. 14.

[a] 2 Inſt. 700. H. P. C. 143. Cro. Ca. 365. 6 Mod. 307. Salk. 358, 359.

Sect. 2. Alſo it ſeemeth to be [b] certain, That ſuch Charge may be caſt n a Corporation aggregate, either in reſpect of a ſpecial Tenure of tain Lands, or in reſpect of a ſpecial Preſcription, and that it may be upon any other Perſons by reaſon of ſuch a ſpecial Tenure, as hath n ſhewn more at large under the ſecond general Head of the precedent apter. But it is [c] ſaid, That a Man ſhall not be bound to repair a new dge built by himſelf, for the common Good: But that the County ſhall bound to repair it, if it become of publick Convenience.

[b] 2 Inſt. 700, 701. H. P. C. 143. Dal. ca. 14. Far. 54, 55.

[c] 2 Inſt. 701. 6 Mod. 307. Salk. 359. See Cro. Ca. 365.

Sect. 3. As to the ſecond Particular, *viz.* In what Manner Perſons nd to ſuch Repairs, are to be proceeded againſt; it ſeemeth to be ar, [d] That any particular Inhabitant or Inhabitants of a County, or Te- nt or Tenants of Land charged to the Repairs of ſuch a Bridge, may be de Defendants to an Indictment for not repairing it, and be liable to the whole Fine aſſeſſed by the Court for the Default of ſuch Re- rs, and ſhall be put to their Remedy at Law for a Contribution from ſe who are bound to bear a proportionable Share in the Charge, for Neceſſity of the Caſe requires the greateſt Expedition in Caſes of this ture.

[d] 1 Jon. 273. Poph. 192. 6 Mod. 307. Salk. 358.

Sect. 4. Alſo it hath been [e] reſolved, That it is not ſufficient for the fendants to an Indictment for not repairing a Bridge, to excuſe them- ves, by ſhewing either that they are not bound to repair the Whole, or y Part of the Bridge, without ſhewing what other Perſon is bound to air the ſame; and it is ſaid, That in ſuch Caſe the whole Charge ſhall laid upon ſuch Defendants, by reaſon of their ill Plea.

[e] 2 Levin. 112. Poph. 192. 43 Aſſ. Pl. 37. 43 Aſſ. Pl. 37. Bro. Preſentment, 22, and 29.

Sect. 5. It is ſaid, That where ſuch Defendants plead, that *A. B.* ought repair the Bridge mentioned in the Indictment, and take a Traverſe to Charge againſt themſelves, the Attorney General in this ſpecial Caſe y take a Traverſe upon a Traverſe, and inſiſt that the Defendants are nd to the Repairs, and traverſe the Charge alledged againſt *A. B.* and t an Iſſue ought to be taken on ſuch ſecond Traverſe; and that the torney General may afterwards ſurmiſe, that the Deſendants are bound repair it, and that the whole Matter ſhall be tried by an indifferent y, *&c.*

See 1 Sid. 140. 2 Levin. 112.

6 Mod. 307. *Sect.* 6. It ſeems that no Inhabitant of a County ought to be a Juror for the Trial of an Iſſue, whether the County be bound to ſuch Repairs or not, but it is ſaid that he may be a good Witneſs.

Sect. 7. As to the ſecond Point, *viz.* In what Manner ſuch Bridges are to be repaired by Statute, it is enacted by 22 *H.* 8. 5. *That the Juſtices of Peace in every Shire of this Realm, Franchiſe, City, or Borough, or four of them at the leaſt, whereof one to be of the* Quorum, *may inquire, hear and determine, in their General Seſſions, of all manner of Annoyances of Bridges broken in the Highways, to the Damage of the King's liege People, and to make ſuch Proceſs and Pains upon every Preſentment afore them, for the Reformation of the ſame, againſt ſuch as owen to be charged for the Making or Amending of ſuch Bridges, as the King's Juſtices of his Bench do commonly to do; or as it ſhall ſeem by their Diſcretions to be neceſſary and convenient for the ſpeedy Amendment of ſuch Bridges.*

Sect. 8. And it is farther enacted, Par. 2 & 3. *That where it cannot be known and proved what Hundred, Riding, Wapentake, City, Borough, Town or Pariſh, nor what Perſon certain, or Body Politick, ought of Right to make ſuch Bridges decayed, by reaſon whereof ſuch decayed Bridges, for Lack of Knowledge of ſuch as owen to make them, for the moſt part lie long without any Amendment, to the great Annoyance of the King's Subjects, in every ſuch Caſe the ſaid Bridges, if they be without City or Town-corporate, ſhall be made by the Inhabitants of the Shire or Riding, within which the ſaid Bridges decayed ſhall happen to be: And if it be within any City or Town-corporate, then by the Inhabitants of every ſuch City or Town-corporate wherein ſuch Bridges ſhall be. And if Part of any ſuch Bridges ſo decayed happen to be in one Shire, Riding, City, or Town-corporate, and the other Part thereof in another Shire, Riding, City, or Town-corporate, or if Part be within the Limits of any City or Town-corporate, and Part without, or Part within one Riding, and Part within another, that then in every ſuch Caſe the Inhabitants of the Shires, Ridings, Cities, or Towns-corporate, ſhall be charged and chargeable to amend, make and repair ſuch Part and Portion of ſuch Bridges ſo decayed, as ſhall lie and be within the Limits of the Shire, Riding, City, or Town-corporate, wherein they be inhabited at the Time of the ſame Decay.*

Sect. 9. And it is farther enacted, Par. 4. *That in every ſuch Caſe where it cannot be known and proved what Perſons, Lands, Tenements, and Bodies politick owen to make and repair ſuch Bridges, that for ſpeedy Reformation and Amending of ſuch Bridges, the Juſtices of Peace within the Shires or Ridings wherein ſuch decayed Bridges being out of Cities and Towns-corporate, and to be within Cities or Towns-corporate, then the Juſtices of Peace within every ſuch City or Town-corporate, or four of the ſaid Juſtices at the leaſt, whereof one to be of the* Quorum, *within the Limits of their ſeveral Commiſſions and Authorities, may call before them the Conſtables of every Town and Pariſh, being within the Shire, Riding, City or Town-corporate, as well within Liberty as without, wherein ſuch Bridges or any Parcel thereof ſhall happen to be, or elſe two of the moſt honeſt Inhabitants within every ſuch Town or Pariſh in the ſaid Shire, Riding, City or Town-corporate, by the Diſcretion of the ſaid Juſtices of Peace. And at and upon the Appearance of ſuch Conſtables or Inhabitants, the ſaid Juſtices of Peace, &c. with the Aſſent of the ſaid Conſtables or Inhabitants, ſhall tax, and ſet every Inhabitant in any ſuch City, Town or Pariſh, within the Limits of their Commiſſions and Authorities, to ſuch reaſonable Aid and Sum of Money, as they ſhall think by their Diſcretions convenient and ſufficient for the Repairing, Re-edifying, and Amending of ſuch Bridges, and after ſuch Taxes made the ſaid Juſtices ſhall cauſe the Names and Sums of every particular Per-*

Vide 1 Keb. 422.

o by them taxed, to be written in a Roll indented. And ſhall alſo have Power nd Authority to make two Collectors of every Hundred, for Collection of all ſuch ums of Money by them ſet and taxed, which Collectors receiving the one Part of he ſaid Roll indented, under the Seals of the ſaid Juſtices, ſhall have Power and Authority to collect and receive all the particular Sums of Money therein con- ined, and to diſtrain every ſuch Inhabitant as ſhall be taxed, and refuſe Pay- ent thereof, in his Lands, Goods and Chattels, and to ſell ſuch Diſtreſs, and of e Sale thereof retain and perceive all the Money taxed, and the Reſidue, (if e Diſtreſs be better) to deliver to the Owner thereof: And that the ſame Juſtices, four of them, within the Limits of their Commiſſions and Authorities, may alſo me and appoint two Surveyors, which ſhall ſee every ſuch decayed Bridge re- ired and amended from Time to Time, as often as need ſhall require, to whoſe ands the ſaid Collectors ſhall pay the ſaid Sums of Money, taxed, and by them ceived: And that the Collectors and Surveyors, and every of them, and their ecutors and Adminiſtrators, and the Executors and Adminiſtrators of them, d every of them, from Time to Time, ſhall make a true Declaration and Ac- pt to the Juſtices of Peace of the Shire, Riding, City, or Town-corporate, erein they ſhall be appointed Collectors or Surveyors, or to four of the ſame Ju- es, whereof one to be of the Quorum, *of the Receipts, Payments, and Expences the ſaid Sums of Money: And if they or any of them refuſe that to do, that n the ſame Juſtices of Peace, or four of them, from Time to Time by their Diſ- tions, ſhall have Power and Authority to make Proceſs againſt the ſaid Collec- and Surveyors, and every of them, their Executors and Adminiſtrators, and Executors and Adminiſtrators of every of them, by Attachments under their ls, returnable at the General Seſſions of Peace: And if they appear, then to pel them to accompt, as is aforeſaid; or elſe if they or any of them refuſe that o, then to commit ſuch of them as ſhall refuſe, to ward, there to remain with- Bail or Mainpriſe, till the ſaid Declaration and Accompt be truly made.*

Sect. 10. And it is farther enacted, Par. 5. *That where any Bridge or dges lien in one Shire or Riding, and ſuch Perſons Inhabitants, Bodies itick, Lands or Tenements, which owen to be charged to the Making and A- ding of ſuch Bridges, lien and abiden in another Shire or Riding, or where Bridges been within any City, or Town-corporate, and the Perſons Inhabi- s, Bodies Politick, Lands or Tenements, that owen to make or repair any Bridges lien and been out of the ſaid Cities and Town-corporate, in every Caſe the Juſtices of Peace of the Shire, City, or Town-corporate, within ch ſuch decayed Bridges, or any Part thereof, ſhall happen to be, ſhall have er to inquire, hear, and determine all ſuch Annoyances, being within the its of their Commiſſions and Authorities. And if the Annoyance be preſented, to make Proceſs into every Shire within this Realm, againſt ſuch as owen ake, or amend any ſuch Bridges ſo preſented before them to be decayed, to Annoyance, and Let of the Paſſage of the King's Subjects, and to do further very Behalf in every ſuch Caſe, as they might do by Authority of the ſaid in Caſe that the Perſons, &c. which owen to be charged to the Amending Making of ſuch Bridges, &c. were in the ſame Shire, &c. where ſuch An- nce ſhall happen to be. And that all Sheriffs, and Bailiffs of Liberties Franchiſes, ſhall truly ſerve and execute Proceſs as ſhall come to their ds from the ſaid Juſtices of Peace, afore whom any Preſentment ſhall be for any ſuch Annoyance, according to the Tenor and Effect of the ſaid ceſs to them directed, &c. on Pain to make ſuch Fine as ſhall be ſet on by the Diſcretion of the ſaid Juſtices.*

ect. 11. But it is provided, Par. 6. *That nothing in the ſaid Act con- d ſhall be prejudicial to the Liberties of the five Ports, or Members of the : And for Reformation of Annoyance of Bridges within the ſaid Ports and Mem-*

Members: It is farther enacted, Par. 7. *That the Warden, Mayors, and Bailiffs elected, and Jurates of the ſame Ports, and every of them, have Power and Authority to inquire, hear, and determine all manner of common Annoyances of Bridges within the ſame Ports and Members, and to make ſuch Proceſs, Pains, Taxations, and all other Things within the ſame Ports and Members, as the Juſtices of Peace may do in other Shires or Places out of the ſame Ports, by Virtue of the ſaid Act in every Behalf.*

Sect. 12. And it is farther enacted, Par. 8. *That the ſaid Juſtices, &c. may allow ſuch reaſonable Coſts and Charges to the ſaid Surveyors and Collectors, as by their Diſcretion ſhall be thought convenient.*

Sect. 13. And it is farther enacted, Par. 9. *That ſuch Part and Portion of the Highways in every Part of this Realm, as well within Franchiſe as without, as lie next adjoining to any Ends of any Bridges within this Realm, diſtant from any of the ſaid Ends by the Space of three hundred Foot, be made, repaired and amended, as often as need ſhall require; and that the Juſtices of Peace in every Shire of this Realm, Franchiſe, City, or Borough, or four of them at the leaſt, whereof one to be of the* Quorum, *within the Limits of their Commiſſions and Authorities, may inquire, hear, and determine in their General Seſſions, all Manner of Annoyances of and in ſuch Highways, ſo being and lying next adjoining to any Ends of Bridges within this Realm, diſtant from any one of the Ends of ſuch Bridges three hundred Foot, and to do in every Thing concerning the Making, Repairing, and Amending ſuch Highways, &c. in as large and ample Manner as they might and may do, to and for the Making, Repairing, and Amending of Bridges, by Virtue of the ſaid Act.*

In the Conſtruction of this Statute the following Opinions have been holden:

2 Inſt. 701. Salk. 359. 6 Mod. 255, 256.

Sect. 14. I. That no private Bridges are within the Purview thereof, but only ſuch as are common in the Highways, where all the King's liege People have, or may have Paſſage.

2 Inſt. 701, 702.

Sect. 15. II. That unleſs the Juſtices of Peace of a County, or Town, *&c.* be four in Number, and one of them of the *Quorum*, they have no manner of Juriſdiction by Virtue of this Statute; but it is ſaid, That the Juſtices of Peace of the County, in which ſuch Town, being not a County of it ſelf, and wanting ſuch a Number of Juſtices, ſhall lie, may by Virtue of the firſt Clauſe of the Statute, determine all Annoyances of Bridges within ſuch Town, *&c.* if it be known what Perſons in certain are bound to repair the ſame: But if it be not known, it ſeems that ſuch Annoyances are left to the Remedy of the Common Law, becauſe the Clauſe which in

2 Inſt. 704.

ſuch Caſe authoriſes the Juſtices of Peace to tax all the Inhabitants, ſeems expreſly to confine the Power of taxing the Inhabitants of ſuch Towns to their own Juſtices, *&c.*

Sect. 16. III. That all Houſholders dwelling in any County, or Town, *&c.* whether they occupy any Lands or not; and alſo all Perſons who have Lands in their own Poſſeſſion or Manurance, whether they dwell in the ſame County, *&c.* or not; and alſo all Bodies Politick, either reſiding in, or having Lands in their own Hands in a County, *&c.* are liable to be taxed as Inhabitants, within the Meaning of the Statute.

2 Inſt. 703.

2 Inſt. 704. Vide 1 Keb. 91.

Sect. 17. IV. That the Taxation to be made in Purſuance of the Statute ought to be aſſeſſed diſtinctly on each Inhabitant, and not on a whole Hundred, Pariſh, or Town in general.

Sect. 18. V. That all Privileges of Exemptions and Diſcharges from Contribution to the Repairs of decayed Bridges, whether ſuch Exemption

ions were originally derived from Charter or Act of Parliament, or any other Foundation whatſoever, are taken away by the expreſs Words of the Statute, *That the Juſtices*, &c. *ſhall tax and ſet every Inhabitant.* 2 Inſt. 704.

Sect. 19. It hath been queſtioned whether a Borough which hath no Bridge within its own Limits, be not liable to contribute to the Repairs of a County-Bridge. 1 Keb. 68.

CHAP. LXXVIII.

Of Nuſances relating to Publick Houſes.

FOR the better Underſtanding of Nuſances relating to publick Houſes, I ſhall conſider:

1. In what Manner they are prevented and reſtrained by the Common Law.
2. In what Manner by Statute.

Sect. 1. As to the firſt Point it ſeems to be agreed, That the Keeper of an Inn may by the Common Law be indicted and fined, as being guilty of a publick Nuſance [a] if he uſually harbour Thieves, or Perſons of ſcandalous Reputation, or [b] ſuffer frequent Diſorders in his Houſe, or take exorbitant Prices, or ſet [c] up a new Inn in a Place, where there is no Manner of Need of one, to the Hindrance of other ancient and well governed Inns, or [d] keep it in a Place in reſpect of its Situation, wholly unfit for ſuch a Purpoſe.

[a] Palm. 374. 2 Ro. Re. 345. [b] H.P.C. 146. Cro. Ca. 549. Dalt. ca. 7. [cd] H.P.C. 146. Dalt. ca. 7. Palm. 374. 2 Ro. Re. 345. [e] Palm. 374. 2 Ro. Re. 345.

Sect. 2. And it ſeems alſo to be clear, That if one who keeps a common Inn, refuſe either to receive a Traveller as a Gueſt into his Houſe, or to find him Victuals or [e] Lodging, upon his tendring him a reaſonable [f] Price for the ſame, he is not only liable to render [g] Damages for the Injury in an Action on the Caſe at the Suit of the Party grieved, but may alſo be [h] indicted and fined, at the Suit of the King; alſo it is ſaid, That he may be compelled by the Conſtable [i] of the Town to receive, and entertain ſuch a Perſon as his Gueſt, and that it is no way [k] material whether he have any Sign before his Door or not, if he make it his common Buſineſs to entertain Paſſengers.

[f] 10 H. 7. 8. a, 39 H. 6. 18. b. 19. a. 9 Co. 87. b. [g] Dy. 158. Pl. 33. Bro. Ac. ſur caſ. 76, 92. [h] H. P. C. 146. Dalt. ca. 7. [i] 5 E. 4. 2. b. Dalt. ca. 7. [k] Palm. 374. 2 Ro. Re. 345, 346.

Sect. 3. It ſeems to have been always clearly [l] agreed, That he who has an Inn by Preſcription, may lawfully enlarge it upon the ſame Land which has been uſed with it, either by erecting new Buildings thereon, or turning Stables into Chambers of Entertainment, and that he ſhall have the ſame Privilege in ſuch new Parts of his Houſe as in any of the old.

[l] 2 Rol. A. 84. Pl. 8. 85. Pl. 9.

Sect. 4. Alſo it ſeems to be [m] ſettled at this Day, That any Perſon may lawfully ſet up a new Inn, unleſs it be inconvenient to the Publick in ſome of the Reſpects taken Notice of in the firſt Section, and that he has no Need of any Licence from the King for this Purpoſe, for the Keeping of an Inn is no Franchiſe, but a lawful Trade, open to every Subject. But if an Inn degenerate into an Ale-houſe, by ſuffering diſorderly Tipling, it ſhall be deemed as ſuch.

[m] 2 Rol. A. 84. A. Salk. 45. 2 Rol. Re. 345. Palm. 367. 374. 2 Keb. 506. 1 Bulſ. 109. Salk. 45.

Sect. 5. As to the ſecond Point, *viz.* In what manner Nuſances of this Kind are prevented and reſtrained by Statute, it is enacted by 12 *Ed.* 2. 6. *That no Officer in City or in Borough, that by reaſon of his Office ought to keep Aſſizes of Wines and Victual, ſo long as he is attendant to that Office, ſhall not merchandize for Wines nor Victuals, neither in Groſs nor by Retail; and if any be convict of ſuch Offence, the Merchandize ſhall be forfeited to the King, and the third Part thereof delivered to the Party that ſued for the ſame,* &c.

Vide F. N. B. 172. Regiſt. 184.

Sect. 6. And it is farther enacted by 6 *Rich.* 2. 9. *That no Victualler ſhall have, exerciſe, or occupy any judicial Office in any Town, but only where no other Perſon ſufficient may be found to have the ſame Office. In which Caſe yet the ſame Judge, for the Time that he ſhall continue in the ſaid Office, ſhall utterly omit and abſtain himſelf and his from the Exerciſe of Victualling upon Pain of forfeiting his Victuals ſo ſold.*

Sect. 7. And it is farther enacted by 3 *H.* 8. 8. *That as often as any Victualler choſen to bear any Office within any City, Borough, or Town-corporate, which for the Time that he ſhall ſtand and be in ſuch Office ſhould have the Aſſeſſing and Correction for ſelling of Victuals, that then two diſcreet and honeſt Perſons of the ſame City, Borough, or Town-corporate, not being Victuallers, nor any of them being a Victualler, ſhall be choſen by the Commonalty of the ſame City, Borough, or Town-corporate, in like Form as the ſaid Officer ſhall be choſen: Which two Perſons, with the ſaid Officer, ſhall be ſworn truly to ſeſs and ſet the Prices and Aſſizes of Victual there, for the Time that any ſuch Victualler ſhall abide in the ſame Office: And that then it ſhall be lawful to all and every of the ſaid Officers, after the ſame Victuals be ſet and ſeſſed by the ſame Officer, and the ſaid two Perſons, or one of the ſame two Perſons, the other being abſent, to merchant and ſell Wines, and all other Victual in Groſs, and at Retail, during the Time that he ſhall be in any ſuch Office, without any Thing therefore to forfeit: The ſaid Statute, Act, and Ordinance of* 12 E. 2. *or any other Act or Acts, Ordinance, or Statute to the contrary made in any wiſe notwithſtanding.*

Vide Cro. Ja. 689, 610. 2 Rol. Re. 225, 226.

Sect. 8. Alſo it is enacted by 21 *Jac.* 1. 21. *That all Hoſtlers or Innholders ſhall ſell their Horſe bread, and their Hay, Oats, Beans, Peaſe, Provender, and alſo all Kind of Victual, both for Man and Beaſt, for reaſonable Gain, having Reſpect to the Prices for which they ſhall be ſold in the Markets adjoining, without taking any Thing for Litter.* And it is farther enacted by the ſaid Statute, *That every Hoſtler and Innkeeper dwelling in any Town or Village, being a Thorough-fare, and no City, Town-corporate, or Market-Town, wherein any common Baker, having been an Apprentice to the Trade for ſeven Years, is dwelling, may make within his Houſe Horſe-bread ſufficient, lawful, and of due Aſſize, according to the Price of Grain or Corn, any Thing in the ſaid Statute contained to the contrary notwithſtanding.* And it is farther enacted, *That if the Horſe-bread, which any of the ſaid Hoſtlers or Innholders ſhall make, be not ſufficient, lawful, and of due Aſſize, according to the Price of Grain and Corn, as aboveſaid; or that if any of them ſhall offend in any Thing contrary to this Act, the Juſtices of Aſſize, Juſtices of Oyer and Terminer, Juſtices of Peace in every Shire, Liberty, or Franchiſe within this Realm, Sheriffs in their Turns, and Stewards in their Leets, may inquire, hear, and determine, the ſaid Offences of the ſaid Hoſtlers and Innholders, who ſhall be fined for the firſt Offence, according to the Quantity of the Offence, and for the ſecond Offence ſhall be impriſoned for one Month, and for the third ſhall ſtand upon the Pillory,* &c.

Sect. 9. And it is enacted by 5 & 6 *Ed.* 6. 25. *That the Juſtices of Peace within every Shire, City, Borough, Town-corporate, Franchiſe, or Liberty within this Realm, or two of them at the leaſt, whereof one to be of the Quorum,*

all have full Power and Authority within every Shire, City, &c. to remove, ſcharge, and put away common Selling of Ale and Beer in common Ale-houſes d Tippling-houſes.

Sect. 10. And it ſeems to have been the general Opinion in the Con- Dal. ca. 7. H. P. C. 147.
ruction of this Clauſe, That an Alehouſe-keeper ſuppreſſed in Purſuance it, cannot be afterwards licenced again but in open Seſſions.

Sect. 11. And it is farther enacted by the ſaid Statute of 5 & 6 *Ed.* 6. Par. 1 & 6. *That none ſhall be admitted or ſuffered to keep any common Ale-uſe or Tippling-houſe, except in Fairs, but ſuch as ſhall be allowed in the open ſions, or by two Juſtices of Peace, whereof one to be of the* Quorum: *And t the ſaid Juſtices ſhall take Bonds and Surety from Time to Time, by cognizance, of ſuch as ſhall be allowed to keep any common Ale-houſe or Tip-g-houſe, as well for and againſt the uſing of unlawful Games, as alſo for Maintenance of good Order within the ſame, as by their Diſcretion ſhall thought neceſſary and convenient; for making of every which Recognizance Parties bound ſhall pay but twelve Pence.*

Sect. 12. And it is farther enacted, Par. 2. *That the ſaid Juſtices ſhall ify the ſame Recognizance at the next Quarter-Seſſions of the ſame Shire, , or Borough, &c. there to remain of Record before the Juſtices of Peace he Shire, &c. upon Pain of forfeiting for every ſuch Recognizance taken, not certified, three Pounds ſix Shillings eight Pence.*

Sect. 13. And it is farther enacted, Par. 3. *That the Juſtices of Peace of y Shire, City, Borough, &c. may at their Quarter-Seſſions by Preſentment, rmation, or otherwiſe by their Diſcretion, inquire of all ſuch Perſons as be allowed to keep any Ale-houſe or Tippling-houſe, and that be bound by gnizance, as is aboveſaid, if any of them have done any Act whereby they forfeited the ſame Recognizance: And the ſaid Juſtices ſhall upon every Preſentment or Information, award Proceſs againſt every ſuch Perſon ſo ented or complained upon before them, to ſhew why he ſhould not forfeit Recognizance, and may alſo hear and determine the ſame by all ſuch Ways Means, as by their Diſcretion ſhall be thought good.*

Sect. 14. And it is farther enacted, Par. 4. *That if any Perſon, other ſuch as ſhall be allowed by the ſaid Juſtices, ſhall obſtinately, and upon wn Authority, take upon him to keep a common Ale-houſe, or Tippling-houſe, all contrary to the Commandment of the ſaid Juſtices, or two of them, uſe nonly Selling of Ale and Beer, except in Fairs; that then the ſaid Juſtices, o of them, whereof one to be of the* Quorum, *ſhall for every ſuch Offence it every ſuch Perſon ſo offending, to the common Gaol within the ſaid e, City, Borough, &c. there to remain without Bail or Mainprize by the e of three Days; and before his Deliverance the ſaid Juſtices ſhall take his gnizance with two Sureties, That he ſhall not keep any common Ale-houſe, ling-houſe, or uſe commonly Selling of Ale or Beer, as by the Diſcretion of aid Juſtices ſhall ſeem convenient.*

Sect. 15. And it is farther enacted, Par. 5. *That the ſaid Juſtices ſhall Certificate of every ſuch Recognizance and Offence, at the next Quarter-ns for the ſame Shire, City, Borough, &c. which Certificate ſhall be a ient Conviction of the ſame Offence; and the ſaid Juſtices upon the ſaid ficate made, ſhall in open Seſſions aſſeſs the Fine for every ſuch Offence, enty Shillings.*

Sect. 16. And it is farther enacted by 3 *Car.* 1. 3. *That if any Perſon upon his own Authority, not being thereunto lawfully licenced, take upon him p a common Ale-houſe or Tippling-houſe, or uſe commonly ſelling of Ale, or , Cyder, or Perry, except in Fairs, every ſuch Perſon ſhall for every ſuch ce, forfeit twenty Shillings to the Uſe of the Poor of the Pariſh where ſuch*

Offence

Offence ſhall be committed, the ſame Offence being viewed by any Mayor, Bailiff, or Juſtice of Peace, or other Head-Officer within the ſeveral Limits, or confeſſed by the Party ſo offending, or proved by the Oath of two Witneſſes, to be taken before any Mayor, Bailiff, or other Head-Officer, or any Juſtice of Peace, being within the Limits of their Commiſſion; the ſaid Penalty to be levied by the Conſtables or Church-wardens of the Pariſh, or Pariſhes, where the ſaid Offence ſhall be committed, who ſhall be accountable therefore to the Uſe of the Poor of the ſaid Pariſh, by Way of Diſtreſs, to be taken and detained by Warrant or Precept from the ſaid Mayor, Bailiff, or Juſtice, &c. by whom the ſaid Offence ſhall be viewed, &c. And for Default of Satisfaction within three Days next enſuing, the ſaid Diſtreſs to be by the ſaid Conſtables, or Church-wardens, apprized and ſold, and the Overplus to be delivered to the Party offending; and if ſuch Offender ſhall not have ſufficient Goods and Chattels, whereby the ſaid twenty Shillings may be levied by Way of Diſtreſs, as aforeſaid, or ſhall not pay the ſaid Sum of twenty Shillings within ſix Days after ſuch Conviction, as aforeſaid, the ſaid Mayor, Bailiff, or Juſtice, &c. before whom the ſaid Offender ſhall be ſo convicted, ſhall commit ſuch Offender to ſome Conſtable, or other inferior Officer of the City, Borough, or Pariſh, &c. where the Offence ſhall be committed, to be openly whipped, as the ſaid Juſtice ſhall limit or appoint. And if ſuch Conſtable, &c. ſhall neglect to execute the ſaid Precept or Warrant, or to execute by himſelf, or ſome other, upon the Offender, the Puniſhment limited by the ſaid Statute, the ſaid Mayor, &c. may commit him to the common Gaol of the ſaid County, City, or Town, &c. there to remain till the ſaid Offender ſhall be by him or ſome other puniſhed and whipped; or until the Perſon ſo neglecting ſhall have paid forty Shillings to the Uſe of the Poor of the Pariſh, for his ſaid Contempt. And if any ſuch unlicenced Alehouſe-keeper ſhall offend in any the Premiſſes the ſecond time, and be thereof convicted in Manner and Form aforeſaid, the ſaid Mayor, Bailiff, or Juſtice, &c. ſhall commit him to the Houſe of Correction, there to remain for one Month, and be dealt withal as an idle, lewd, and diſorderly Perſon. And if ſuch Perſon ſhall again offend, and be convict, as aforeſaid, he ſhall be committed to the ſaid Houſe of Correction, as aforeſaid, there to remain till the Order of the General-Seſſions for the County, City, or Borough, &c. be for be delivered from thence. Provided that ſuch Offender as ſhall be puniſhed by Virtue of this Act, ſhall not be puniſhed again for the ſame Offence by the aforementioned Statute of 5 & 6 Ed. 6. *And that ſuch Offender as ſhall be puniſhed by Virtue of the ſaid Statute of* 5 & 6 Ed. 6. *ſhall not be puniſhed again by Virtue of this Act.*

Sect. 17. Alſo it is enacted by 1 Jac. 1. 9. and 4 Jac. 1. 15. and 21 Jac. 1. 7. and 1 Car. 1. 4. *That if any Inn-keeper, Victualler, or Alehouſe-keeper, or any Keeper of a Tavern, or one who ſells Wine in his Houſe, and alſo keeps an Inn, or Victualling in his Houſe, do permit or ſuffer any Perſon, unleſs ſuch Perſon be an Inhabitant of the Place where ſuch Inn, &c. ſhall be, or be there to continue Drinking or Tippling in any Inn or Victualling-houſe, &c. other than ſuch as ſhall be invited by any Traveller, and ſhall accompany him only during his neceſſary Abode there; and other than Labouring and Handicraftsmen in Cities, and Towns-corporate, and Market-Towns upon the uſual working Days for one Hour at Dinner-time, to take their Diet in an Alehouſe; and other than Labourers and Workmen, who for the following of their Work by the Day, or the Great, in any City, Town-corporate, Market-Town, or Village, ſhall for the Time of their ſaid continuing in Work there, ſojourn, lodge, or victual in ſuch Inn, Ale-houſe, or other Victualling-houſe; or other than for urgent and neceſſary Occaſions, to be allowed by two Juſtices of Peace, That then every ſuch Inn-keeper, &c. ſhall forfeit ten Shillings to the Uſe of the Poor of the Pariſh where ſuch Offence ſhall be committed; the ſame Offence being viewed and ſeen by*

Mayor, Bailiff, or Juſtice of Peace within their ſeveral Limits, or found by Verdict on a Trial upon an Indictment at Aſſizes, Seſſions, or Court-Leet, or proved by the Oath of [a] one Witneſs to be taken before any Mayor or Bailiff, &c. any one Juſtice of the Peace, or by the voluntary Confeſſion of any Offender, after which Confeſſion the Oath of ſuch Offender ſhall be taken, and be a ſufficient Proof againſt any other Offending at the ſame Time. 4 Jac. 1. 5. [a] 21 Jac. 1. 7.

Sect. 18. And it is farther enacted by the ſaid Statute of 1 *Jac.* 1. 9. Par. 3. *That the ſaid Penalty of ten Shillings ſhall be levied by the Conſtables or Church-wardens of the Pariſhes where the Offence ſhall be committed, by way of Diſtreſs, and for Default of Satisfaction within ſix Days, the ſame to be preſently appraiſed and ſold, and the Surpluſage to be delivered to the Party of whom the Diſtreſs was taken, and for Want of ſufficient Diſtreſs the Party offending to be by the ſaid Mayor, &c. committed to the common Gaol, there to remain till the ſaid Penalty be paid. And if the ſaid Conſtables or Church-wardens do neglect their Duty in levying the ſaid Penalties, or in Default of Diſtreſs, do neglect to certify the ſame within twenty Days to the ſaid Mayor, &c. every Perſon ſo offending ſhall forfeit forty Shillings, to the Uſe of the Poor of the Pariſh where ſuch Offence ſhall be committed, to be levied by Diſtreſs of Goods, by Warrant from any one Juſtice of Peace, &c. to be taken and detained ſix Days; within which, if Payment be not made, the ſame Goods to be appraiſed and ſold, &c.*

Sect. 19. But it is provided by the ſaid Statute of 1 *Jac.* 1. 9. *That the Puniſhment of ſuch as ſhall offend againſt the ſame, within either of the two Univerſities, or the Precincts or Liberties of the ſame, ſhall be done upon the Offenders, and Juſtice miniſtred in this Behalf, according to the Intent of the ſaid Law, by the Governours, Magiſtrates, Juſtices of the Peace, or other principal Officers of either of the ſaid Univerſities, to whom in other Caſes the Adminiſtration of Juſtice, and Correction and Puniſhment of Offenders by the Laws of this Realm and their ſeveral Charters doth belong; and that no other within their Liberties for any Matter concerning the ſaid Law contrary to their ſeveral Charters, do intermeddle, and that all Penalties to be forfeited by Virtue of the ſaid Act, within either of the Univerſities or the Liberties or Precincts of the ſame, ſhall be levied by the Officers or Miniſters of either of the ſaid Univerſities, to be from Time to Time in that Behalf appointed by the Vice-Chancellors thereof for the Time being reſpectively, and that all Powers and Authorities given by the ſaid Act, ſhall by the Governours, Magiſtrates, and principal Officers aboveſaid, of either of the ſaid Univerſities, be duly executed within the Limits of the ſaid Univerſities, &c.*

Sect. 20. And it is farther enacted by 4 *Jac.* 1. 5. and 21 *Jac.* 1. 7. *That whoever ſhall be drunk, and within* [a] *ſix Months after ſuch Offence, ſhall be convict thereof either on an Indictment at Aſſizes or Seſſions, or Court-Leet, before any* [b] *Juſtice of Peace in any County, or any Juſtice of Peace, or other head Officer in any City or Town-corporate, upon View or Confeſſion, or by Oath of one Witneſs, ſhall forfeit five Shillings, to be paid within one Week after Conviction, to the Church-wardens of the Pariſh where the Offence ſhall be committed, &c. And if ſuch Perſon ſhall refuſe or neglect to pay the ſaid Forfeiture, the ſame ſhall be levied of his Goods by Warrant or Precept from the ſaid Court, or Judge before whom the ſame Conviction ſhall be: And if the Offender be not able to pay the ſaid Sum of five Shillings, he ſhall be committed to the Stocks for every Offence, there to remain ſix Hours; and if he ſhall be convicted a ſecond Time of the like Offence, he ſhall be bound to the* [c] *good Behaviour, with two Sureties in a Recognizance of ten Pounds. And if any Conſtable or other inferiour Officer of the Place where the Offence ſhall be committed, &c. do neglect the due Correction of the ſaid Offender, or the due Levying of the ſaid Penalties, he ſhall forfeit ten Shillings to the Uſe of the Poor, &c. to be levied by way of Diſtreſs, by Warrant from any Mayor, &c.*

[a] 4 Jac. 1. 5. Par. 11.
[b] 21 Jac. 1. 7. 4 Jac. 1. 5.
[c] Par. 6.

Sect. 21. And it is farther enacted by the ſaid Statute of 4 *Jac.* 1. 5. and 21 *Jac.* 1. 7. and 1 *Car.* 1. 4. *That if any Perſon ſhall remain or continue drinking or tippling in any Inn, Victualling-houſe, Ale-houſe, or* [a] *Tavern, &c. whether he be an* [b] *Inhabitant of the Place at the Time of ſuch drinking, or not, and the ſame be viewed by any Mayor, or other Head-Officer, or Juſtice of Peace, or confeſſed by the Offender, or proved by one Witneſs in the Manner preſcribed for the above mentioned Offence of ſuffering Tippling in publick Houſes, unleſs it be in ſuch Caſes as are excepted in the above mentioned Act, relating to the ſaid Offence of ſuffering tippling, &c. Every Perſon ſo offending, and being convicted* [c] *within ſix Months, ſhall forfeit three Shillings and four Pence, to the Uſe of the Poor of the Pariſh where the Offence ſhall be committed, to be levied by Way of Diſtreſs in ſuch Manner as the above mentioned Forfeitures for Drunkenneſs are to be levied: And if any ſuch Offender be not able to pay the ſaid Forfeiture, any Mayor, Head Officer, Juſtice of Peace, or Court where ſuch Conviction ſhall be, may ſet him in the Stocks for four Hours.*

[a] 1 Ca. 1. 4.
[b] 21 Jac. 1. 7.
Supra Sect. 17.
[c] 4 Jac. 1. 5. Par. 11.
Supra Sect. 20.

Sect. 22. And it is farther enacted by the ſaid Statute of 4 *Jac.* 1. Par. 7. *That all Conſtables, Church-wardens, Headboroughs, Tithingmen, Aleconners and Sidemen ſhall in their ſeveral Oaths incident to their ſeveral Offices, be charged in like Sort to preſent the Offences contrary to the ſaid Statute.*

Sect. 23. But it is provided by the ſame Statute, Par. 8. *That nothing therein contained ſhall in any wiſe abridge the Eccleſiaſtical Juriſdiction.* And it is farther provided, Par. 9. *That no Offender, who hath once been puniſhed for his Offence againſt any Article of the ſaid Act, by any the Ways or Means before limited, ſhall be eftſoons puniſhed for the ſame Offence by any other Way or Means.*

Sect. 24. And it is farther provided, Par. 10. *That nothing in the ſaid Act contained ſhall be prejudicial to either of the Univerſities, but that the Chancellor, Maſter, and Scholars, &c. may as fully uſe and enjoy all their Juriſdictions, Rights, Privileges, and Charters, as before the ſaid Statute they had or might have done; any Thing in the ſaid Act to the contrary notwithſtanding.*

Sect. 25. And it is enacted by 7 *Jac.* 1. 10. *That if any Perſon being an Alehouſe-keeper, ſhall be lawfully convicted for any Offence committed againſt any of the Branches of either of the ſaid Acts of* 1 Jac. 1. 9. *or* 4 *Jac.* 1. 5. *he ſhall for the Space of three Years next enſuing the ſaid Conviction, be utterly diſabled to keep any ſuch Alehouſe.* [89]

CHAP. LXXIX.

Of Monopolies.

FOR the better Underſtanding the Nature of the Offence of procuring or making Uſe of a Monopoly, I ſhall conſider:

1. What ſhall be ſaid to be a Monopoly.
2. In what Manner the procuring, or making Uſe thereof, are reſtrained by the Common Law.
3. In what Manner by Statute.

Sect. 1. As to the firſt Point, it ſeemeth that a Monopoly is an Allowance by the King, to any Perſon or Perſons, of the ſole Buying, Selling, Making, Working, or Uſing of any Thing, whereby any Perſon is ſought to be reſtrained from any Freedom which he had before, or hindred from his lawful Trade. 3 Inſt. 181. Noy 182.

As to the ſecond Point it ſeemeth, That the procuring or making uſe of ſuch Monopolies, is reſtrained by the Common Law two ways,

1. By declaring all Grants of this Kind to be void.
2. By making thoſe who procure or make uſe of them, liable to be fined.

Sect. 2. And firſt it is ſaid, That all Grants of this Kind relating to any known Trade, are made void by the Common Law, as being againſt the Freedom of Trade, and diſcouraging Labour and Induſtry, and reſtraining Perſons from getting an honeſt Livelihood by a lawful Imployment, and letting it in the Power of particular Perſons to ſet what Prices they pleaſe on a Commodity; all which are manifeſt Inconveniences to the Publick. See Skin. 132 to 137. 165 to 173. 197 to 204. 223 to 226. East-India Company and Sandys.

Sect. 3. And upon this Ground it hath been [a] reſolved, That the King's Grant to any particular Corporation of the ſole Importation of any Merchandize is void, whether ſuch Merchandize be prohibited by Statute or not.

Sect. 4. And for the like Reaſons alſo it hath been reſolved, That the Grant of the ſole [b] Ingroſſing of Wills and Inventories in a ſpiritual Court, or of the ſole [c] Making of Bills, Pleas and Writs in a Court of Law, to any particular Perſon, is void.

Sect. 5. Alſo it hath been adjudged, That the King's Grant of the ſole Making, Importing, and Selling of [d] Playing-Cards, is void, notwithſtanding the Pretence, That the Playing with them is a Matter meerly of Pleaſure and Recreation, and often much abuſed, and therefore proper to be reſtrained; for ſince the Playing with them is in itſelf lawful and innocent, and the Making of them an honeſt and laborious Trade, there is no more Reaſon why any Subject ſhould be hindred from getting his Livelihood by them than by any other Imployment.

Sect. 6. But it ſeemeth clear, That the King may for a reaſonable Time make a good Grant to any one of the ſole Uſe of any Art invented or firſt brought into the Realm by the Grantee, as ſhall be ſhewn more at large in the 14th, 15th, and 16th Sections of this Chapter. Alſo it ſeems to be the better Opinion, That the King may grant to particular Perſons the ſole Uſe of ſome particular Imployments, (as of Printing the Holy Scriptures and Law Books, *&c.*) whereof an unreſtrained Liberty might be of dangerous Conſequence. Noy 182, 183. 1 Mod. 256. 3 Keb. 792. 3 Mod. 75.

Sect. 7. Secondly, Alſo it is holden, That the procuring or making Uſe of an unlawful Monopoly, is farther reſtrained by the Common Law, by ſubjecting thoſe who are guilty thereof to a Fine and Impriſonment for the Offence, as being *Malum in ſe*, and contrary to the ancient and fundamental Laws of the Kingdom: And it is ſaid, That there are Precedents of Proſecutions of this Kind in former Days, but I cannot find any modern Inſtance thereof. 3 Inſt. 181. 2 Inſt. 47, 61.

Sect. 8. As to the third Point, *viz.* In what Manner the procuring and making Uſe of a Monopoly are reſtrained by Statute, it is declared and enacted by 21 *Jac.* 1. 3. *That all Monopolies, and all Commiſſions, Grants, Licences, Charters and Letters Patents to any Perſon or Perſons, Bodies Politick*

[a] 2 Rol. Ab. 214.
[b] 2 Rol. Ab. 214. Pl. 4.
[c] 1 Jones 231.
[d] 11 Co. 84. 2 Rol. Ab. 214. Pl. 5. 3 Mod. 75. 85, &c. Mo. 671. Pl. 919. Noy 173, &c. 2 Inſt. 47.

Politick or Corporate whatſoever, of or for the ſole Buying, Selling, Making, Working, or Uſing of any Thing within this Realm, or Wales, *or of any other Monopolies, and all Proclamations, Inhibitions, Reſtraints, Warrants of Aſſiſtance and all other Matters whatſoever any Way tending to the Inſtituting, Strengthening, Furthering, or Countenancing of the ſame, or any of them, are altogether contrary to the Laws of this Realm, and ſo are and ſhall be utterly void, and of none Effect, and in no wiſe to be put in Ure or Execution.*

Sect. 9. And it is farther enacted, Par. 3. *That all Perſons, Bodies Politick and Corporate whatſoever, ſhall be diſabled and uncapable to have, uſe, exerciſe or put in Ure, any Monopoly, or any ſuch Commiſſion, Grant, or Licence, &c. or other Thing tending as aforeſaid, or any Liberty, Power, Faculty, grounded, or pretended to be grounded, upon them, or any of them.*

Sect. 10. And it is farther declared and enacted, Par. 2. *That all Monopolies, and all ſuch Commiſſions, Grants and Licences, &c. and all other Things tending as aforeſaid, and the Force and Validity of them, ought to be, and ſhall be examined, heard, tried, and determined, by and according to the Common Laws of this Lealm, and not otherwiſe.*

3 Inſt. 182, 183. *Sect.* 11. In the Conſtruction of this Clauſe it hath been holden, That all Matters of this Kind ought to be tried in the Courts of Common Law only, and not at the Council-Table, or in the Court of Chancery, or in any other Court of like Nature.

Sect. 12. And it is farther enacted, Par. 4. *That if any Perſon ſhall be hindred, grieved, diſturbed, or diſquieted, or his Goods or Chattels any Way ſeized, attached, diſtrained, taken, carried away or detained, by Occaſion or Pretext of any Monopoly, or of any ſuch Commiſſion, Grant or Licence, &c. or other Matter or Thing tending as aforeſaid, and will ſue to be relieved in any of the Premiſſes, he ſhall have his Remedy for the ſame at the Common Law by Action grounded on the ſaid Statute, to be heard and determined in the King's Bench, Common Pleas or Exchequer, againſt the Party by whom he ſhall be ſo hindred or grieved, &c. or by whom his Goods ſhall be ſo ſeized or attached, &c. wherein every ſuch Perſon, which ſhall be ſo hindred or grieved, &c. or whoſe Goods ſhall be ſo ſeized or attached, &c. ſhall recover three Times ſo much as the Damages which he ſuſtained by Means of ſuch Hindrance, &c. and double Coſts; and in ſuch Suits, or for the ſtaying or delaying thereof, no Eſſoin, Protection, Wager of Law, Aid Prayer, Privilege, Injunction or Order of Reſtraint, ſhall be in any wiſe, prayed, granted, admitted, or allowed, nor any more than one Imparlance: And if any Perſon ſhall after Notice that the Action depending is grounded upon the ſaid Statute, cauſe or procure any Action at the Common Law grounded thereon to be ſtayed or delayed before Judgment, by Colour or Means of any Order, Warrant, Power or Authority, ſave only of the Court wherein ſuch Action ſhall be depending, or after Judgment ſhall cauſe or procure the Execution to be ſtayed or delayed by Colour or Means of any Order, Warrant, Power or Authority, ſave only by Writ of Error or Attaint, that then the ſaid Perſon or Perſons ſo offending, ſhall incur a* Præmunire.

3 Inſt. 183. *Sect.* 13. It is ſaid, That the firſt Branch of this laſt Clauſe relating to the delaying of Cauſes of this Kind before Judgment, not only extendeth to the Privy Council, Chancery, Exchequer-Chamber, and the like, but alſo to thoſe who ſhall procure any Warrant from the King for ſuch Purpoſe; and it is ſaid, That the latter Branch, relating to the delaying of Execution after Judgment, extendeth even to the Judges of the Court where the Cauſe is depending.

Sect. 14. But it is provided, Par. 6. *That no Declaration in the Statute mentioned ſhall extend to any Letters Patents and Grants of Privilege for any Term of fourteen Years or under, of the ſole working or making of any manner*

w Manufactures within this Realm, (under which Words Manufactures Salk. 447.
ewly brought into the Realm from beyond Sea are included, tho' they were
t new there) *to the true and first Inventor and Inventors of such Manu-*
ctures, which others, at the Time of making such Letters Patents and Grants,
ll not use, so as also they be not contrary to the Law, nor mischievous to the
ate, by raising Prices of Commodities at home, or hurt of Trade, or generally
convenient: The said fourteen Years to be accompted from the Date of the first
tters Patents, or Grant of such Privilege, but that the same shall be of such
rce as they should be, if the said Act had never been made, and of none other.

Sect. 15. It hath been resolved, That no new Invention concerning the 3 Inst. 184.
orking of any Manufacture, is within the Meaning of this Exception, un-
s it be substantially new, and not barely an additional Improvement of an
one.

Sect. 16. Also it hath been holden, That a new Invention to do as much 3 Inst. 184.
ork in a Day by an Engine, as formerly used to imploy many Hands, is
within the said Exception, because it is inconvenient in turning so many
ouring Men to Idleness.

Sect. 17. Also it seemeth clear, that no old Manufacture in use before, 3 Inst. 184.
be prohibited in any Grant of the sole Use of any such new Invention.

Sect. 18. And it is farther provided, Par. 7. *That nothing in the said*
contained shall extend to any Grant or Privilege, Power, or Authority
atsoever before the said Act, made, granted, allowed, or confirmed by any Act
Parliament, so long as the same shall continue in Force.

Sect. 19. And it is farther provided, Par. 9. *That nothing in the said Act*
tained shall be in any wise prejudicial to any City, Borough, or Town-
corate within this Realm, concerning any Grants, Charters, or Letters Pa-
ts to them made, or concerning any Custom used by or within them, or unto
Corporations, Companies, or Fellowships of any Art, Trade, Occupation, or
stery, or to any Companies or Societies of Merchants within this Realm, erected
the Maintenance, Enlargement, or ordering of any Trade or Merchandize:
that the same Charters, Customs, Corporations, &c. *and their Liberties and*
munities shall be of such Force and Effect as they were before the making of
said Act, and of none other; any Thing before in the said Act contained to
contrary in any wise notwithstanding.

Sect. 20. And it is farther provided, Par. 10. *That nothing in the said*
contained shall extend to any Letters Patents, or Grants of Privilege, con-
ning Printing; nor to any Commission, Grants, or Letters Patents concerning
digging, making, or compounding of Salt-Peter, or Gun-Powder; or the
ing or making of Ordnance, or Shot for Ordnance: Nor to any Grant or
tters Patents of any Office erected before the making of the said Statute, and
in Being, and put in Execution, other than such Offices as had been decried
Proclamation: But that all such Grants, &c. *shall be of the like Force and*
ect, and no other, as if the said Act had never been made.

Sect. 21. But it is enacted by 16 *Car.* 1. 21. *That it shall be lawful for*
Persons, as well Strangers, as natural born Subjects, to import any Quantities
Gun-Powder whatsoever, paying such Customs and Duties for the same as by
rliament shall be limited: And that it shall be lawful for all his Majesty's Sub-
s of this his Realm of England, *to make and sell any Quantities of Gun-Powder*
is Pleasure, and also to bring into this Kingdom any Quantities of Salt-Peter,
imstone, or any other Materials for the making of Gunpowder: And that if
Person shall put in Execution any Letters Patents, Proclamation, Edict,
, Order, Warrant, Restraint, or other Inhibition whatsoever, whereby the Im-
tation of Gun-Powder, Salt-Peter, Brimstone, or other the Materials afore
tioned, shall be any ways prohibited or restrained, he shall incur a Præmunire.

Sect. 22. And it is farther provided by the ſaid Statute of 21 *Jac.* 1. 3. Par. 11. 12. *That nothing in the ſaid Act contained ſhall extend to any Commiſſion or Grant concerning the digging, compounding, or making of Allum, or Allum-Mines,* &c. *nor concerning the Licencing of the Keeping of any Tavern, or ſelling of Wines, to be ſpent in the Manſion-Houſe, or other Place, in the Tenure or Occupation of the Party ſelling the ſame, and a farther Proviſion is made in the latter Part of the Statute, for ſome particular Grants to particular Corporations and Perſons, as* Newcaſtle *upon* Tine, *&c.*

3 Inſt. 185. *Sect.* 23. But it is ſaid, That the ſaid Clauſe relating to Allum was needleſs, becauſe all ſuch Mines belong of Courſe to the Perſons in whose Grounds they are, and therefore no Privilege concerning them can be granted but in the King's own Ground.

CHAP. LXXX.

Of Foreſtalling, Ingroſſing and Regrating, and other Offences of the like Nature.

FOR the better underſtanding the Nature of Foreſtalling, Ingroſſing and Regrating, and other ſuch like Offences, I ſhall conſider,

1. How ſuch Offences are treated by the Common Law.
2. How by Statute.

As to the firſt Point, I ſhall conſider:

1. What is eſteemed an Offence of this Kind by the Common Law.
2. How ſuch Offence is puniſhable by the Common Law.

[a] 43 Aſſ. 38. 3 Inſt. 195, 196. Bro. Indictment, 40. Preſentment, 12. [b] Crom. 80. b. [c] Crom. 80. b. *Sect.* 1. As to the firſt of theſe Particulars it is ſaid, That all Endeavours whatſoever to enhanſe the common Price of any Merchandize, and all Kinds of Practices which have an apparent Tendency thereto, whether by ſpreading falſe [a] Rumors, or by [b] buying Things in a Market before the accuſtomed Hour, or by buying and ſelling again the ſame Thing in the ſame [c] Market, or by any other ſuch like Devices, are highly Criminal at Common Law, and that all ſuch Offences antiently came under the general Notion of Foreſtalling, which included all Kinds of Offences of this Nature.

Sect. 2. And ſurely there can be no Attempt of this Kind, but muſt be looked upon as a high Offence againſt the Publick, inaſmuch as it ſo apparently tends to put a Check upon Trade, to the general Inconvenience of the People, by putting it out of their Power to ſupply themſelves with a Commodity, without an unreaſonable Expence, which often proves extremely oppreſſive to the poorer Sort, and cannot but give juſt Cauſe of Complaint to the richeſt.

3 Inſt. 196. H. P. C. 152. *Sect.* 3. But it hath been reſolved, That any Merchant, whether he be a Subject or a Foreigner, bringing Victuals, or any other Merchandize into the Realm, may ſell the ſame in Groſs, but that no Perſon can lawfully buy within the Realm any Merchandize in Groſs, and ſell the ſame

in Groſs again, becauſe by ſuch Means the Price will be inhanſed, for the more Hands any Merchandize paſſeth through, the dearer it muſt grow, because every one will make his Profit of it: And if ſuch Practices were allowable, a rich Man might ingroſs into his Hands a whole Commodity, and then ſell it at what Price he ſhould think fit; which is of ſuch dangerous Conſequence, that the bare Ingroſſing of a whole Commodity with an Intent to ſell it at an unreaſonable Price, is an Offence indictable at the Common Law, whether any Part thereof be ſold by the Ingroſſer, or not. Cro. Ca. 231, 232.

Sect. 4. And ſo jealous is the Common Law of all Practices of this Kind, that it will not ſuffer Corn to be ſold in the Sheaf, perhaps for this Reaſon, becauſe by ſuch Means the Market is in Effect foreſtalled. 3 Inſt. 197. H. P. C. 152.

Sect. 5. As to the ſecond Particular, *viz.* In what manner Offences of this Kind are puniſhable by the Common Law; it is ſaid, That by an ancient Statute the Offender was to be grievouſly amerced for the firſt Offence; for the ſecond, to be condemned to the Pillory; for the third, to be impriſoned; and for the fourth, to be compelled to abjure the Vill: And there ſeems to be no Doubt, but that at this Day all Offenders of this Kind are liable to a Fine and Impriſonment, anſwerable to the Heinouſneſs of their Offence, upon an Indictment at Common Law. 3 Inſt. 195.

As to the ſecond Point, *viz.* In what manner theſe Offences are treated by Statute, I ſhall conſider;

1. What particular Proviſions have been made relating to this Matter.
2. What Caſes have been excepted out of thoſe Proviſions.
3. In what Manner the Offenders are to be proceeded againſt.

The particular Proviſions of this Nature are five-fold;

1. The obliging all Victuallers to ſell at a reaſonable Price.
2. The allowing all Foreigners free Liberty of importing and ſelling Victuals.
3. The giving the great Officers of State a Power to tax the Price of Victuals.
4. The prohibiting Conſpiracies to raiſe the Price of Victuals.
5. The prohibiting all Foreſtalling, Ingroſſing, and Regrating.

Sect. 6. The firſt of the ſaid Proviſions depends upon 23 *Ed.* 3. 6. by which it is enacted, *That Butchers, Fiſhmongers, Regrators, Hoſtelers, Brewers, Bakers, Poulterers, and other Sellers of all Manner of Victual, ſhall be bound to ſell the ſame for a reaſonable Price, having reſpect to the Price that the Victual ſhall be ſold at in the Places adjoining; ſo that ſuch Sellers have moderate Gains, reaſonably to be required, according to the Diſtance of the Place from whence the ſaid Victuals be carried, on pain to forfeit double the Value,* &c. *And the chief Officers of Towns are required to ſee this Statute executed, on Pain of paying the treble Value of the Thing ſold,* &c.

Sect. 7. The ſecond of the above mentioned Proviſions depends upon 25. 2. 10. and 11 *Ric.* 2. 7. and 1 *H.* 4. 17. by which it is enacted, *That all Manner of Aliens, being of the Amity of the King, coming into any Town of this Realm with Fiſh, or other Victual, ſhall be under the King's eſpecial Protection, and may cut their Fiſhes and Victuals in Pieces, and in part, or in all, by Retail, or in Groſs, as to them beſt ſhall ſeem, to ſell and make their Profit,* &c. And it is farther enacted by 14 *H.* 6. 6. *That if any Man diſturb any Man to ſell his Fiſh in Groſs, or at Retail, in Part or in Whole, contrary to the above*

above mentioned Ordinances, and thereof be duly attainted at the Suit of the King, or of the Party, he ſhall forfeit ten Pounds, &c.

Sect. 8. The Third of the above mentioned Proviſions depends upon 25 *H.* 8. 2. by which it is enacted, *That to remedy the frequent Riſe of the Price of Cheeſe, Butter, Capons, Hens, Chickens, and other neceſſary Victuals for Man's Suſtenance, by ingroſſing and regrating the ſame; the Lord Chancellor and other high Officers of State,* &c. *may, upon Complaint of any inhanſing of the Prices of ſuch Victuals without Ground or reaſonable Cauſe, in any Part of the King's Dominions, ſet and tax reaſonable Prices of ſuch Victuals: And that after Proclamation made of ſuch Prices, all Farmers, Owners, Broggers, and all other Victuallers whatſoever, having or keeping any ſuch Victuals to the Intent to ſell, ſhall ſell the ſame to ſuch of the King's Subjects as will buy them at ſuch Prices as ſhall be taxed by ſuch Proclamation, under the Pains to be limited in the ſaid Proclamation.*

Vide infra S. 36.

Sect. 9. But it is provided, *That the Officers of Cities, Boroughs, or Towns-corporate, and all other Perſons having Authority to ſet Prices of ſuch Victuals, may ſet ſuch Prices in ſuch Manner as if the ſaid Act had not been made.*

Sect. 10. The fourth of the above mentioned Proviſions depends upon 2 & 3 *E.* 6. 15. by which it is enacted, *That if any Butchers, Brewers, Bakers, Poulterers, Cooks, Coſter-mongers or Fruiterers, ſhall conſpire, covenant, promiſe, or make any Oaths, that they ſhall not ſell their Victuals but at certain Prices; or if any Artificers, Workmen, or Labourers, do conſpire, covenant, or promiſe together, or make any Oaths, that they ſhall not make or do their Work, but at a certain Price or Rate; or ſhall not enterpriſe, or take upon them to finiſh what another hath begun, or ſhall do but a certain Work in a Day, or ſhall not work but at certain Hours and Times, every ſuch Perſon ſo conſpiring,* &c. *ſhall forfeit for the firſt Offence ten Pounds, and if he pay not the ſame within ſix Days, ſhall ſuffer twenty Days Impriſonment; and for the ſecond Offence ſhall forfeit twenty Pounds,* &c. *and for the third, forty Pounds,* &c. *And if any ſuch Conſpiracy, Covenant, or Promiſe be made by any Society, Brotherhood, or Company, of any Craft, Myſtery or Occupation of the Victuallers above mentioned, with the Preſence or Conſent of the more Part of them, that then immediately upon ſuch Act of Conſpiracy,* &c. *over and beſides the particular Puniſhment before appointed, their Corporation ſhall be diſſolved; and that the ſaid Offences ſhall be determined at the Aſſizes, Seſſions of the Peace, or Court Leet. See* 22 & 23 Car. 2. 15.

Sect. 11. The fifth of the above mentioned Proviſions depends chiefly upon 3 & 4 *E.* 6. 21. and 5 & 6 *E.* 6. 14. By the firſt of which Statutes it is enacted, *That no Perſon, not being an Inn-holder, or Victualler, ſelling by Retail in his Houſe, ſhall buy to ſell again any Butter or Cheeſe, unleſs he ſell the ſame again by Retail, in open Shop, Fair, or Market, not ſelling more than a Weight of Cheeſe, or a Barrel of Butter at one Time.*

Vide infra S. 36.

Sect. 12. And it is farther enacted by the ſaid Statute of 5 & 6 *E.* 6. which is the principal Statute relating to this Matter, *That whoſoever ſhall buy or cauſe to be bought, any Merchandize, Victual, or any other Thing whatſoever coming by Land or by Water toward any Market or Fair to be ſold in the ſame, or coming toward any City, Port, Haven, Creek or Road of this Realm,* Wales, *from any Parts beyond the Sea, to be ſold; or make any Bargain, Contract, or Promiſe for the having or buying of the ſame, or any Part thereof, coming as is aforeſaid, before the ſame ſhall be in the Market, Fair, City, Port,* &c. *ready to be ſold; or ſhall make any Motion by Word, Letter, Meſſage, or otherwiſe, to any Perſon or Perſons, for the inhanſing of the Price, or dearer ſelling of any Thing above mentioned; or elſe diſſwade, move, or ſtir any one coming to the Market or Fair, to abſtain or forbear to bring or convey any*

he Things above rehearſed, to any Market, Fair, City, or Port, &c. to be ſold, ſhall be deemed a Foreſtaller.

Sect. 13. It hath been reſolved, That an Indictment upon this Clauſe, charging the Defendant with meeting *J. S.* at ſuch a Place near a certain Town, and there buying of him certain Goods, which he was about to ſell in the Market of ſuch Town, is inſufficient, becauſe it is not expreſly ſaid, that the Goods ſo bought were coming to the Market to be ſold. 1 Rol. Re. 421.

Sect. 14. And it is farther enacted by the ſaid Statute of 5 & 6 *Ed.* 6. 14. par. 2. *That whoſoever ſhall by any Means, regrate, obtain, or get into his Lands or Poſſeſſion, in any Fair or Market, any Corn, Wine, Fiſh, Butter, Cheeſe, Candles, Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geeſe, Capons, Hens, Chickens, Pigeons, Conies, or other dead Victual whatſoever, that ſhall be brought to any Fair or Market to be ſold, and do ſell the ſame again in any Fair or Market holden in the ſame Place, or within four Miles thereof, ſhall be taken for a Regrator.*

Sect. 15. And it is farther enacted, Par. 3. *That whoſoever ſhall engroſs or get into his Hands by buying, contracting or promiſe taking, other than by Demiſe, Grant, or Leaſe of Land or Tithe, any Corn growing in the Fields, or any other Corn or Grain, Butter, Cheeſe, Fiſh, or other dead Victuals whatſoever, within the Realm of* England, *to the Intent to ſell the ſame again, ſhall be reputed an unlawful Ingroſſer.*

In the Conſtruction of the laſt mentioned Clauſes the following Opinions have been holden:

Sect. 16. I. That [a] Salt is a Victual within the Meaning of it, not only becauſe it is of Neceſſity of it ſelf for the Food and Health of Man, but alſo becauſe it ſeaſoneth and maketh wholeſome Beef, Pork, and other Victuals, in which Reſpect it ſeemeth it ſelf to come under the Notion of Victual, and ſeemeth to be ſo underſtood by the Makers of 13 *El.* 25. as appears from Par. 21. of that Statute. [a] Inſt. 195. H. P. C. 152. Cro. Ca. 231.

Sect. 17. II. That ſuch [b] Victual only as is neceſſary for the Food of Man within the Purview of it; and therefore that Apples, and Cherries, and ſuch like Fruits, are not within the Intent of it; for the Words are, *Corn, Grain, Butter, Cheeſe, Fiſh, or other dead Victuals*, which Words are ſaid to import the ſame as if it had been ſaid, or other dead Victuals of like Quality: Alſo it is ſaid, That there is not any Thing prohibited within the Statute, but what hath a Proviſo, how in ſome Kind it might be bought; and therefore, ſince there is not any ſuch Proviſo for Apples, that they never were intended to be reſtrained: And agreeably hereto it hath been holden, That neither [c] Hops nor [d] Malt are within the Meaning of the Statute. [b] 3 Inſt. 195. H. P. C. 152. Cro. Ca. 231. Owen 135. Cro. Ja. 214. [c] Cro. Ca. 231. [d] 3 Inſt. 196. H. P. C. 152. Con. Owen 135. 1 Rol. Re. 12.

Sect. 18. III. That the Buying of Corn, with an Intent to make [e] Starch of it, and then to ſell it, is not within the ſaid Clauſe, becauſe it is not brought to be ſold again in the ſame Nature in which it was bought, but muſt be firſt altered by a Trade or Science, and then ſold again. And for the laſt Reaſon it ſeemeth to be the better [f] Opinion, That the Buying of Corn in order to make Meal of it, and then to ſell it, is no way within the ſaid Clauſe; and that the Buying of [g] Barley with an Intent to make it into Malt, and then to ſell it, had no need of the Exception made for it in the ſaid Statute. [e] Bridg. 5, 6. Owen 135. [f] Moore 595. Pl. 810. Cro. Ca. 231. Con. Owen 135. [g] Cro. Ca. 231. 3 Inſt. 196. See Chap. 33. Sect. 15, 18. Con. Owen 135.

Sect. 19. IV. That there is no Neceſſity in an Information or Indictment grounded on the ſaid Clauſe for ingroſſing any Victual therein mentioned, to ſay, [h] That the Defendant did not come by it by a Demiſe of [h] 1 Jon. 157.

Land, &c. but that the Defendant, if he have any ſuch Matter to alledge in his Defence, may give it in Evidence.

2 Leon. 39. *Sect.* 20. V. That in every ſuch Information, &c. the Words of the Statute muſt be preciſely purſued, and therefore that it is not ſufficient to ſay, That the Defendant bought ſo much Corn, &c. becauſe the Words are, *ſhall ingroſs, or get into his Hands, by buying*, &c.

Sect. 21. And it is farther enacted by the ſaid Statute of 5 & 6 E. 6. 14. Par. 4, 5, 6. *That whoever ſhall offend in any of the Things before recited, and be thereof duly convicted, ſhall for the firſt Offence, ſuffer Impriſonment for two Months, and forfeit the Value of the Goods ſo by him bought or had; and for the ſecond Offence, ſhall ſuffer Impriſonment for one half Year, and forfeit the double Value of the Goods*, &c. *and for the third Offence, ſhall be ſet on the Pillory, and forfeit all his Goods, and be committed to Priſon during the King's Pleaſure.*

Sect. 22. And from hence it ſeems clearly to follow, as well as from the general Rules of Law, That no Information for any of the above mentioned Offences againſt the ſaid Statute, can be good, without ſhewing with certain the Quantity of the Thing in Relation to which the Defendant is ſuppoſed to have incurred the Penalty, not only becauſe otherwiſe the Judgment to be given on ſuch an Information can never be pleaded in Bar of any other, becauſe it cannot appear that both of them were brought for the ſame Thing, but alſo becauſe it cannot appear to the Court what Forfeiture the Defendant ought to incur, unleſs the Extent of the Offence, which is to be the Meaſure of it, be ſpecially ſet forth: And for theſe Reaſons it hath

2 Bulſt. 317. Cro. Ca. 381. been adjudged, That an Information for ingroſſing Corn, the Quantity whereof is expreſſed by the Word *Cumulus* only, is not good; yet it is ſaid, That

6 Mod. 32. an Indictment for ingroſſing *magnam quantitatem frumenti*, is ſufficient.

Sect. 23. And it is farther enacted by the ſaid Statute of 5 & 6 E. 6. 14. Par. 8. *That if any Perſon having ſufficient Corn and Grain, for the Proviſion of his own Houſe, and ſowing of his Grounds for one Year, do buy any Corn in any Fair or Market, for the Change of his Seed, and do not bring in the ſame Fare or Market the ſame Day, ſo much Corn as he ſhall fortune to buy for his Seed, and ſell the ſame if he can, as the Price of Corn that goeth in the ſaid Market or Fair, that then every ſuch Perſon ſhall forfeit the double Value of the Corn ſo bought.*

Sect. 24. And it is farther enacted, Par. 9. *That if any Perſon ſhall buy any manner of Oxen, Ronts, Steers, Kine, Heifers, Calves, Sheep, Lambs, Goats or Kids living, and ſell the ſame again alive, unleſs he keep and feed the ſame five Weeks, he ſhall loſe the double Value of the Cattle ſo bought and ſold, one Moiety whereof ſhall be to the King, and the other Moiety to him that will ſue for the ſame.*

The principal Exceptions out of the above mentioned Statutes ſeem to be reducible to the following Heads:

1. Such as relate to Corn.
2. Such as relate to Butter and Cheeſe, and dead Cattle.
3. Such as relate to Beer, Cyder, and Mum.
4. Such as relate to Fiſh.
5. Such as relate to Wine, Oil, Sugar, Salt, &c.
6. Such as relate to Fiſhmongers, Victuallers, Butchers, Poulterers, &c.
7. Such as relate to Badgers and Drovers.
8. Such as relate to Leſſors, &c.
9. Such as relate to Shipping and Caſtles.
10. Such as relate to Towns-Corporate.

Sect. 25. As to the firſt of theſe Exceptions relating to Corn, it is en-
cted by the ſaid Statute of 5 & 6 *Ed.* 6. 14. Par. 7. *That the buying of*
y ſuch Barley, Bigge, or Oats, as any Perſon (not foreſtalling) ſhall buy
convert into Malt or Oat-meal in his own Houſe, and ſo ſhall be converted
deed, ſhall not be taken to be within the ſaid Act.

Sect. 26. It ſeemeth to be the better Opinion, That if there had been
ſuch Exception, yet the Buying of Corn for ſuch Purpoſe ſhould not
intended to have been within the Purview of the Statute, as hath been
ore fully ſhewn already *Sect.* 18. But upon the Suppoſition, that ſuch an
xception was neceſſary, it hath been holden that the Buying of Corn and
rning it into Malt in another's Houſe, becauſe it was of ſo great a Quan- Owen 135.
y, that it could not be malted in the Buyer's own Houſe, is not within
Benefit of it.

Sect. 27. And it is farther enacted by 1 *W. & M.* Seſſ. 1. Ch. 12. *That*
n Malt or Barley, Wincheſter *Meaſure, ſhall be at twenty-four Shillings* Vide 5 &
uarter or under; Rye at thirty-two Shillings a Quarter or under; and Wheat 6 Ed. 6. 14.
orty-eight Shillings a Quarter or under, in any Port of England *or* Wales; Par. 12, 13.
y Perſon who ſhall put on Ship-board in Engliſh *Shipping, the Maſter and* 5 El. 5. Par. 26.
Thirds of his Mariners being their Majeſties Subjects, any Sorts of the Corn 1 Ja. 1. 25.
reſaid, from any ſuch Ports where the Rates ſhall not then be higher than as Par. 26.
reſaid, with Intent to export the ſaid Corn to Parts beyond the Seas, ſhall bring 21 Ja. 1. 28.
rtificate in Writing under his Hand, containing the Quantity and Quality 3 Ca. 1. 4.
he Corn ſo ſhipped, to the Perſons appointed to collect the Cuſtoms within any 12 Ca. 2. 4.
Port; and upon Proof of ſuch Certificate by one or more credible Perſons
Oath, and upon Bond given by every ſuch Exporter of two hundred Pounds
every hundred Tun of Corn ſo ſhipped, and ſo proportionably, that the ſaid
, (Dangers of Seas excepted) ſhall be exported beyond the Seas, and not land-
gain in England, Wales, Guernſey, Jerſey, *or* Berwick *on* Tweed, *ſhall*
ive from the ſaid Perſons appointed to receive the Cuſtoms, for every Quar-
f Barley or Malt ground or unground, two Shillings and Six-pence; for
y Quarter of Rye ground or unground, three Shillings and Six-pence; for e-
Quarter of Wheat ground or unground, five Shillings, without any Cuſtom,
or Reward to be paid for the ſame. And upon Certificate returned under the
non Seal of the chief Magiſtrate in any Place beyond Sea, or under the
ds and Seals of two known Engliſh *Merchants upon the Place, that ſuch*
was there landed, or upon Proof by credible Perſons that ſuch Corn was ta-
by Enemies, or periſhed at Sea, the Examination and Proof thereof being
to the Receivers of the Cuſtoms, the Bond ſhall be delivered up to be can-
d; and the Monies ſo paid, ſhall be allowed as paid to their Majeſties.

ect. 28. As to the Second of the above mentioned Exceptions, relating Vide ſupra
utter and Cheeſe, and dead Cattle, it is enacted by 21 *Jac.* 1. 22. *That* Sect. 11, 14,
ber of the above mentioned Statutes of 3 & 4 Ed. 6. 21. *or* 5 & 6 Ed. 6. 14. 15, &c.
ny other Proviſion whatſoever before that Statute made, concerning the Sale
utter and Cheeſe in open Shop, Fair or Market, or the Providing or Buy-
f any Butter or Cheeſe, ſhall in any wiſe extend to any Cheeſemonger, or
ow-Chandler, free of the City of London, *and having been brought up as*
Apprentice ſeven Years, trading in Butter and Cheeſe, for ſuch Butter
Cheeſe, and either of them, as he ſhall ſell in London, Weſtminſter, *or*
hwark, for the Victualling of any Ship of the King or Subject, or to any
er and Cheeſe, which he ſhall ſell by any Quantities at one Time, and to one
ſon, not exceeding four Wey of Cheeſe, or four Barrels of Butter, without
d, ſo as he ſell the ſame in open Shop, Fair, or Market: Provided that if
Juſtices of Peace of any County at their Quarter-Seſſions, ſhall declare that
Traders ſhall forbear to buy any Butter or Cheeſe, for any Time within ſuch
County;

County; that then during the Time of ſuch Reſtraint, the ſaid Traders in Butter and Cheeſe, that ſhall buy any ſuch Butter or Cheeſe, and ſell the ſame again by retail, contrary to any of the ſaid Acts, ſhall not be freed from the Penalties thereof.

Sect. 29. And it is farther enacted by 3 & 4 *W. & M.* 8. *That it ſhall be lawful for every Perſon, native or foreign, at any Time, to ſhip, lade, carry and tranſport, or export, from any Place within* England, Wales, or Berwick *on* Tweed, *in any Part of the World in Amity with their Majeſties, all Sorts of Beef, Pork, or Hogs-fleſh, Butter, Cheeſe, or Candles, free from all Cuſtom or Impoſition whatſoever.*

Sect. 30. As to the Third of the above mentioned Exceptions relating to Beer, Cyder, and Mum, it is enacted by 1 *Will. & Mar.* Seſſ. 1. Ch. 24. *That any Perſon may export any ſtrong Ale, ſtrong Beer, Cyder or Mum to be ſpent beyond the Seas, paying Cuſtom for the ſame, at the Rate of one Shilling for every Tun, in ſuch manner as is ſet forth more at large in the ſaid Statute.*

Sect. 31. As to the Fourth of the above mentioned Exceptions relating to Fiſh, it is enacted by the ſaid Statute of 5 & 6 *Ed.* 6. 14. Par. 7. *That the Buying of any dried or ſalted Fiſh, Herring, or Sprats (not foreſtalled) and ſold for reaſonable Prices, ſhall not be deemed any Offence contrary to the ſaid Act.*

Sect. 32. And it is farther enacted by the ſaid Statute, Par. 15. *That it ſhall be lawful for any Subject, dwelling within one Mile of the main Sea, to buy all manner of Fiſh freſh or ſalted, (not foreſtalling the ſame) and to ſell the ſame again at reaſonable Prices.*

Sect. 33. And it is farther enacted by 5 *El.* 5. Par. 13. *That ſo much of the ſaid Statute of* 5 & 6 Ed. 6. 14. *and ſo much of all other Statutes againſt Regrators, Ingroſſers, and Foreſtallers, as concerneth the Buying of Sea-fiſh unſalted, or Mud-fiſh, to be taken and brought in any* Engliſh *Subjects Ships, Crayers, or other Veſſels, into any Place of this Realm, ſhall be utterly repealed; ſo much of the ſaid Fiſh, as any Buyer upon the Sea by way of Foreſtalling or Regrating, ſhall bring and diſcharge in any Port or Haven within this Realm.*

Sect. 34. As to the Fifth of the above mentioned Exceptions relating to Wine, Oil, Sugar, Salt, *&c.* the ſame Exception is made in Relation to Wine, Oil, and Salt by the ſaid Statute of 5 *El.* 5. Par. 13. as is ſet forth in the laſt Section concerning Fiſh unſalted, or Mud-Fiſh.

Sect. 35. And it is farther enacted by 13 *El.* 25. Par. 21. *That the ſaid Statute of* 5 & 6 Ed. 6. 14. *is not meant to extend, nor ſhall extend to, Wines, Oils, Sugars, Spices, Currans, nor other foreign Victuals, brought into this Realm from beyond the Seas, Fiſh and Salt only excepted.*

Sect. 36. As to the Sixth of the above mentioned Exceptions relating to Fiſhmongers, Victuallers, Butchers and Poulterers, *&c.* it is enacted by the ſaid Statute of 5 & 6 Ed. 6. 14. *That the Buying of any Victual by any Fiſhmonger, Butcher or Poulterer, as concern his own Faculty, Craft, or Myſtery, otherwiſe than by Foreſtalling, which ſhall ſell the ſame again at reaſonable Prices by Retail; or the Buying of any Wine or other dead Victuals above mentioned, being Meat for Man's Suſtenance, by any Innholder, or other Victualler, to ſell the ſame by Retail within his Houſe, or to any of his Neighbours for their Suſtenance, for reaſonable Prices, ſhall not be deemed any Offence contrary to the ſaid Act.*

Cro. Ca. 314. 1 Rol. Re. 11, 12. 1 Jon. 320.

Sect. 37. Notwithſtanding this Exception it hath been reſolved, That any of the Perſons therein mentioned may be indicted for ingroſſing Victuals, with an Intent to ſell them again, againſt the Form of the Statute; for it ſhall be intended that they ingroſſed, and did not ſell at reaſonable Prices.

Sect. 38. As to the ſeventh of the above mentioned Exceptions relating to dgers and Drovers, it is enacted by the ſaid Statute of 5 & 6 *E.* 6. 14. r. 7. *That the Buying of any Corn, Fiſh, Butter, or Cheeſe, by any ſuch dger, Lader, Kidder, or Carrier, that ſhall be allowed to that Office by ree Juſtices of Peace,* &c. *which ſhall ſell or deliver in open Fair or Mar-, or to any other Victualler, or to any other Perſon for the Proviſion of his uſe, all ſuch Corn, Grain, Butter and Cheeſe, as any ſuch Perſon ſhall buy, cauſe to be bought, and that within one Month next after he ſhall ſo buy any h Corn, Grain, Butter or Cheeſe, ſo that the ſame ſhall be bought without reſtalling, ſhall not be deemed any Offence contrary to the ſaid Statute.*

Sect. 39. And it is farther enacted by the ſame Statute, Par. 12. *That hall be lawful to every Perſon who ſhall be allowed by three Juſtices of Peace, uy (otherwiſe than by Foreſtalling) Corn, Grain, or Cattle, to be carried by ter from any Place within this Realm, or* Wales, *unto any other Place within ſaid Realm, or Dominions, if he ſhall without Fraud embark within forty ys next after he ſhall have bought the ſame, or taken Covenant, or Promiſe the buying thereof, and with all poſſible Expedition tranſport the ſame to Place as his Cocket ſhall declare, and there unlade the ſame, and bring a tificate thereof from a Juſtice of Peace of the County, or Head-Officer of Town and Cuſtomer of the Port where it ſhall be unladen,* &c. *to be direct- o the Cuſtomer and Comptroller of the Port where it ſhall be embarked.*

Sect. 40. And it is farther enacted by the ſame Statute, Par. 16, 17. *That hall be lawful for any Perſon known for a common Drover, being licenced hree Juſtices of Peace,* &c. *to buy Cattle in ſuch Shires where Drovers had wont in Times paſt, accuſtomably to buy Cattle at their free Liberty and aſure, and to ſell the ſame as is aforeſaid, at reaſonable Prices, in com- Fairs or Markets, diſtant from the Place where he ſhall buy the ſame forty les, ſo that the ſame Cattle be not bought by way of Foreſtalling.*

Sect. 41. And it is farther enacted by 5 *El.* 12. and 13 *El.* 25. Par. 20. t no Drover of Cattle, Badger, Lader, Kidder, Carrier, Buyer or Tranſporter Corn or Grain, Butter and Cheeſe, ſhall be licenſed to any ſuch Office or Do- in any County except* Weſtmorland, Cumberland, Lancaſter, Cheſter *or k, but only in the General open Quarter-Seſſions of the Peace, to be holden in Shire where ſuch Perſon ſo to be allowed ſhall dwell, and ſhall have dwelled e Years next before the* Teſte *of his Licence: And that no Perſon be admit- to any of the ſaid Offices or Doings, but ſuch only as be or have been mar- Men, and ſhall be at the Time of ſuch Licence to be granted, Houſholders, not Houſhold-Servants, nor Retainers to any Perſon, and of the Age of ty Years: And that ſuch Licences ſhall be good only for one Year next af- the Date, and ſhall bear Date of the Day and Place where the ſaid Seſſions be holden, and ſhall be ſigned and ſealed with the proper Hands and Seals hree Juſtices preſent at the ſame Seſſions, whereof one to be of the* Quorum, *ain that every Perſon that ſhall take any Licence contrary to this Ordnance, forfeit five Pounds, and that all Licences made otherwiſe than is before eſſed, ſhall be void; and that the Juſtices in the ſaid Seſſions ſhall by their cretion, take Bond and Surety from Time to Time, by Recognizance of ſuch hall be allowed a common Drover of Cattle, Badger, or Lader,* &c. *that they any of them ſhall by Colour of ſuch Licence foreſtal, or engroſs, or other- do any Thing contrary to the Meaning of the ſaid Statute of* 5 & 6 E. 6. 14. *that every ſuch Licence and Recognizance ſhall be made and written by Clerk of the Peace of every County, where ſuch Licence ſhall be granted, or is Deputy, and by no other Perſon; and that every Perſon that ſhall have ſuch Licence, ſhall pay to the Clerk of the Peace,* &c. *Twelve-pence only; for every ſuch Recognizance, eight Pence; and for regiſtring the ſame*

Licence and Recognizance, four Pence, and that the ſaid Clerk, &c. *for the ſaid Fee, ſhall keep one Regiſter-Book, and therein ſhall regiſter and write all the Names, Surnames, and Dwelling-Places of ſuch as ſhall be ſo licenced, with a brief Entry of the ſaid Licence, and of the Day, Time, and Place where it ſhall be granted; and that the ſaid Clerk of the Peace ſhall bring the ſaid Book to every Seſſions, that it may appear what Number of Licences have been granted. And that no Perſon ſhall by Authority of any ſuch Licence, buy any Corn or Grain out of open Fair or Market to ſell again, unleſs he ſhall be thereunto licenced by ſpecial and expreſs Words contained in ſuch Licence, upon Pain to forfeit five Pounds for every Time that he ſhall do to the contrary; and that one Moiety of the Forfeitures afore rehearſed, ſhall be to the Queen, and the other to him who will ſue for the ſame,* &c.

Sect. 42. As to the Eighth of the above mentioned Exceptions relating to Leſſors, it is enacted by the ſaid Statute of 5 & 6 *E.* 6. 14. Par. 7. That *the Taking of any Cattle, Corn, Grain, Butter, Cheeſe, or any other Thing of the ſaid Statute mentioned, reſerved without Fraud or Covin, upon any Leaſe for Life or Years, ſhall not be deemed any Offence contrary to the ſaid Statute.*

Sect. 43. As to the Ninth of the above mentioned Exceptions relating to Shipping and Caſtles, it is farther enacted by the ſame Paragraph of the ſaid Statute. *That the ſame ſhall not extend to Proviſion made, without Fraud, by any Perſon, of any of the Things in the ſaid Statute mentioned, for victualling of any Ship, Caſtle, or Fort, within the King's Dominions, made without Foreſtalling, which ſhall be employed only to that Uſe and Purpoſe,* &c.

Sect. 44. As to the Tenth of the above mentioned Exceptions relating to Towns-Corporate, it is farther enacted by the ſame Paragraph, That *ſaid Statute ſhall not extend to any common Proviſion to be made without Fraud by any Perſon, of any of the Things in the ſaid Statute mentioned, for any City, Borough, or Town-corporate.*

Sect. 45. Alſo it is enacted by the ſaid Statute of 5 *El.* 12. Par. 9. concerning the licenſing of Badgers, &c. *That nothing therein contained ſhall any wiſe extend to the Prejudice of the Liberty of any City or Town-corporate, but that every of them may aſſign and licence Purveyors, for the Proviſion of the ſame, as they might have done before.*

Sect. 46. As to the third Point, *viz.* In what Manner Offenders of this Kind are to be proceeded againſt, it is enacted by the ſaid Statutes of 5 & 6 *E.* 6. 14. Par. 10, 11. and 5 El. 12. Par. 8. *That the Juſtices of Peace in every County at their Quarter-Seſſions may enquire, hear, and determine the Offences contrary to either of the ſaid Acts, by Inquiſition, Preſentment, Bill, or Information before them exhibited, and by Examination of two lawful Witneſſes, or by any of the ſame Ways or Means, by their Diſcretion, make Proceſs thereupon, as though they were indicted before them by Inquiſition, or by Verdict of twelve Men or more; and upon the Conviction of the Offender, by Information or Suit of any other than the King, make Extracts of the Moiety of the Forfeitures to be levied to the King's Uſe,* &c. *and award Execution of the other Moiety for the Complainant,* &c. *by* Fieri facias, *or* Capias, *as the King's Juſtices at* Weſtminſter *uſe to do,* &c. *and if ſuch Conviction ſhall be at the King's Suit, the Whole ſhall be levied to his Uſe and Profit.*

Sect. 47. Alſo it is provided by 31 *El.* 5. which ordains that Informations for Offences againſt Penal Statutes, muſt be laid in the proper County, *That nothing in the ſaid Statute contained, ſhall extend to any Information, Declaration, for any Offence compriſed in any Statute made againſt Ingroſſing, Regrating, or Foreſtalling, where the Penalty or Forfeiture ſhall appear not to the Value of twenty Pounds, or above, but that every ſuch Offence may be laid in any County at the Pleaſure of the Informer.*

See B. 2. Ch. 26. Sect. 26 to 40.

CHAP. LXXXI.

Of Barratry.

N treating of Barratry, I ſhall conſider:

1. Who ſhall be ſaid to be a Barrator.
2. In what Manner ſuch an Offender is to be proceeded againſt.
3. To what Puniſhment he is liable.

Sect. 1. As to the firſt Point it ſeems, That a Barrator is a common ver, Exciter, or Maintainer of Suits or Quarrels, either in Courts, or the Country. Co. Lit. 368. 8 Co. 36. b.

Sect. 2. And it is ſaid not to be material, whether the Courts wherein h Suits are commenced, be of Record or not, or whether ſuch Quarrels the Country relate to a diſputed Title of Poſſeſſions or not: But that all nds of Diſturbances of the Peace, and the Spreading of falſe Rumors Calumnies, whereby Diſcord and Diſquiet may grow among Neighrs, are as proper Inſtances of Barratry, as the Taking or Keeping the ſeſſion of Lands in Controverſy. Co. Lit. 368. 8 Co. 36. b.

Sect. 3. But it hath been holden, That a Man ſhall not be adjudged a rator in Reſpect of any Number of falſe Actions brought by him in his n Right; however if ſuch Actions be merely groundleſs and vexatious hout any Manner of Colour, and brought only with a Deſign to oppreſs Defendants, I do not ſee why a Man may not as properly be called a rator for bringing ſuch Actions himſelf, as for ſtirring up others to bring m. 1 Rol. Abr. 355. A. 3 Mod. 98. 8 Co. 36. b.

Sect. 4. But it ſeems, That an Attorney is in no Danger of being ged guilty of an Act of Barratry, in reſpect of his maintaining anr in a groundleſs Action, to the commencing whereof he was no way y. 3 Mod. 97, 98.

Sect. 5. Alſo it ſeems clear, That no one can be a Barrator in reſpect one Act only; for every Indictment for ſuch Crime muſt charge the fendant with being *Communis Barractator*. 8 Co. 36. b.

Sect. 6. It ſeems to have been holden, That a Feme Covert cannot be icted as a common Barrator, but this Opinion ſeems juſtly queſtionable; ſince a Feme Covert is as capable of exciting Quarrels, in the frequent petition whereof the Notion of Barratry ſeems to conſiſt, as if ſhe were , why ſhould ſhe not as properly be indictable for it? 2 Rol. Re. 39. See Chap. 1. Sect. 13.

Sect. 7. As to the ſecond Point, *viz.* In what Manner Offenders of this d are to be proceeded againſt, it is enacted by 34 *E.* 3. 1. *That in every nty ſhall be aſſigned for the Keeping of the Peace one Lord, and with him e or four of the moſt worthy of the County*, &c. *and that they ſhall have wer to reſtrain Offenders, Rioters, and all other Barrators, and to purſue, eſt, take, and chaſtiſe them, according to their Treſpaſs or Offence; and auſe them to be impriſoned and duly puniſhed according to the Law and oms of the Realm, and according to that which to them ſhall ſeem beſt lo by their Diſcretions and good Adviſement*, &c.

Sect. 8.

Con. B. 2. Ch. 8. Sect. 38, 39. Yelv. 46. 2 Rol. R. 151.

Sect. 8. It ſeemeth from theſe Words, That Juſtices of Peace (as ſuch) have Cognizance of Barratry without any other Commiſſion, *ſed Quære*; for the contrary Opinion ſeems to have been holden in *Rolle*'s Reports.

1 Mod. 288. 1 Sid. 282. Cro. Ja. 526.

Sect. 9. However it ſeems clear, That no general Indictment of this Kind, charging the Defendant with being a common Oppreſſor, and Diſturber of the Peace, and Stirrer up of Strife among Neighbours, is good, without adding the Words *communis Barractator*, which is a Term of Art appropriated by the Law to this Purpoſe.

[a] 2 Rol. Abr. 79. Pl. 3. 82. Pl. 6. Cro. Ja. 527. Cro. Ca. 340. 2 Keb. 409, 410.

Sect. 10. [a] Alſo it ſeemeth to be certain, That an Indictment of Barratry concluding *contra formam Statuti*, is good, tho' no Statute be made directly againſt it, but only for the Puniſhment of it, ſuppoſing it an Offence at Common Law.

Cro. El. 148. [b] 2 Keb. 410. Cro. El. 195. Con. Latch 194. 2 H. H. P. C. 180.

Sect. 11. [b] Alſo it hath been holden, That an Indictment of this Kind may be good, without alledging the Offence at any certain Place; becauſe from the Nature of the Thing, conſiſting in the Repetition of ſeveral Acts, it muſt be intended to have happened in ſeveral Places; for which Cauſe it is ſaid, That a Trial ought to be by a Jury from the Body of the County.

Palm. 450. 1 Rol. Re. 295. [c] Cro. Ja. 527.

Sect. 12. [c] But it hath been reſolved, That ſuch an Indictment is not good, without concluding *contra Pacem, &c.* for this is an eſſential Part of it.

[d] 5 Mod. 18.

Sect. 13. [d] Alſo it ſeemeth to be ſettled Practice, not to ſuffer the Proſecutor to go on in the Trial of an Indictment of this Kind, without giving the Defendant a Note of the particular Matters, which he intends to prove againſt him; for otherwiſe it will be impoſſible to prepare a Defence againſt ſo general and uncertain a Charge, which may be proved by ſuch a Multiplicity of different Inſtances.

Hutton 104. Vide 1 Dan. Abr. 111. Pl. 6. 113. Pl. 15.

Sect. 14. As to the third Point, *viz.* In what Manner Offenders of this Kind are to be puniſhed; it is ſaid, That if they be common Perſons they are to be fined and impriſoned, and bound to their good Behaviour; and if they be of any Profeſſion relating to the Law, that they ought alſo to be farther puniſhed, by being diſabled to practiſe for the Future.

CHAP. LXXXII.

Of Uſury.

OFFENCES under the Degree of Capital more immediately againſt the Subject, not amounting to an actual Diſturbance of the Peace, which may be committed by private Perſons without any Relation to an Office, and which are neither infamous nor groſly ſcandalous, and more immediately affect the Intereſts of particular Perſons, ſeem to be reducible to the following Heads:

1. Uſury.
2. Maintenance.
3. The Offence of buying or ſelling pretended Titles.

In treating of Uſury, I ſhall conſider:

1. What it is.
2. How it is reſtrained by Common Law.
3. How by Statute.

ect. 1. And firſt it ſeems, that Uſury, in a ſtrict Senſe, is a Contract n the Loan of Money to give the Lender a certain Profit for the Uſe it, upon all Events, whether the Borrower make any Advantage of it, he Lender ſuffer any Prejudice for the Want of it, or whether it be re- on the Day appointed, or not. Wood's Inſt. 171. 3 Inſt. 151. See Bro. Uſury 12.

ect. 2. And in a larger Senſe it ſeemeth, That all undue Advantages n by a Lender againſt a Borrower come under the Notion of Uſury, ther there were any Contract in relation thereto, or not; as where one Poſſeſſion of Land, made over to him for the Security of a certain Debt, ins his Poſſeſſion after he hath receiv'd all that is due from the Profits he Land. Gibſ. 1070.

ect. 3. But it hath been reſolved, That an Agreement to pay double Sum borrowed, or other Penalty on the Non-payment of the principal t at a certain Day, is not uſurious, becauſe it is in the Power of the ower, wholly to diſcharge himſelf, by repaying the Principal accord- to the Bargain. 2 Ro. A. 801. Pl. 2, 3. 802. Pl. 4. 26 E. 3. 71. a. 2 Inſt. 89.

ect. 4. As to the ſecond Point, *viz.* How Uſury is reſtrained by the mmon Law; it is ſaid, That anciently it was holden to be abſolutely wful for a Chriſtian to take any Kind of Uſury, and that whoſoever guilty of it, was liable to be puniſhed by the Cenſures of the Church is Life-time; and that if after Death any one was found to have been Uſurer while living, all his Chattels were forfeited to the King, and his ds eſcheated to the Lord of the Fee. [a] 3 Inſt. 151. 2 Rol. A. 800, 801. 2 Inſt. 506, 507. Palm. 293. 294.

ect. 5. Alſo it ſeemeth to have been the Opinion of the Makers of e late Acts of Parliament, as 5 *Ed.* 6. 20. 13 *El.* 8. Par. 5. and *Jac.* 1. 17. Par. 5. That all Kinds of Uſury are contrary to good Con- nce. [b] 2 Ro. A. 801. 26 Ed. 1. 71. a. 1 Rol. Ab. 18. Pl. 14, 15.

ect. 6. [b] And agreeably hereto it ſeemeth formerly to have been the eral Opinion, That no Action could be maintained on any Promiſe to any Kind of Uſe for the Forbearance of Money, becauſe that all ſuch tracts were thought to be unlawful, and conſequently void. 2 Rol. Re. 239, 240, 469. Palm. 293.

ect. 7. But it ſeems to be generally agreed at this Day, [c] That the king of reaſonable Intereſt for the Uſe of Money is in it ſelf lawful, conſequently that a Covenant or Promiſe to pay it, in Conſideration of Forbearance of a Debt, will maintain an Action: For why ſhould one who has an Eſtate in Money be as well allowed to make a fair fit of it, as another who has an Eſtate in Land? And what reaſon can e be, that the Lender of Money ſhould not as well make an Advantage t as the Borrower? Neither do the Paſſages in the *Moſaical* Law, which generally urged againſt the Lawfulneſs of all Uſury, if fully conſidered, nuch prove the Unlawfulneſs, as the Lawfulneſs of it; for if all Uſury e againſt the Moral Law, why ſhould it not be as much ſo in reſpect Foreigners, of whom the *Jews* were expreſly allowed to take it, as in pect of thoſe of the ſame Nation, of whom alone they were forbidden eceive it? From whence it ſeems clearly to follow, That the Prohibi- of it to that People was merely political, and conſequently doth not nd to any other Nation. [c] 1 Rol. A. 25. Pl. 35. 2 Rol. A. 782, 802. H. 1. Pl. 4. Winch 114, 120. Cro. Ja. 378, 379. 1 Vent. 198. 199. 3 Keb. 15. Cro. Ca. 273. 1 Vent. 198. Exod. 22. ver. 25. Levit. 25. ver. 36, 37. Deuter. 23. ver. 19, 20.

Sect. 8. As to the third Point, *viz.* How Uſury is reſtrained by Statute, it is enacted by 12 *Annæ*, 16. *That no Perſon whatſoever, ſhall upon any Con-tract which ſhall be made from and after the nine and twentieth Day of Sep-*temper, 1714. *take, directly or indirectly, for Loan of any Money, Ware, Merchandize, or other Commodities whatſoever, above the Value of ſix Pounds, for the Forbearance of one hundred Pounds for a Year, and ſo after that Rate for a greater or leſſer Sum, or for a longer or ſhorter Time; and that all Bonds, Contracts, and Aſſurances whatſoever, made after the Time aforeſaid for Payment of any Principal, or Money to be lent, or covenanted to be per-formed upon or for any Uſury, whereupon or whereby there ſhall be reſerved or taken above the Rate of five Pounds in the Hundred, as aforeſaid, ſhall be ut-terly void,* (tho' the Reſervation be of ſo much if requeſted, and the Request be never made) *and that all and every Perſon or Perſons whatſoever, which ſhall after the Time aforeſaid, upon any Contract to be made after the ſaid nine and twentieth Day of* September, *take, accept, and receive, by Way or Means of any corrupt Bargain, Loan, Exchange, Chevizance, Shift, or In-tereſt of any Wares, Merchandize, or other Thing or Things whatſoever, or by any deceitful Way or Means, or by any Covin, Engine, or deceitful Contri-vance, for the forbearing or giving Day of Payment for one whole Year, of and for their Money or other Thing, above the Sum of five Pounds for the for-bearing of one hundred Pounds for a Year, and ſo after that Rate for a greater or leſſer Sum, or for a* [a] *longer or ſhorter Term, ſhall forfeit and loſe for every ſuch Offence the treble Value of the Money, Wares, Merchandizes, and other Things ſo lent, bargained, exchanged, or ſhifted.* And Note, That the treble Value is not forfeited, unleſs ſomething be taken above the legal Rate; but the very Contract alone avoids the Security.

3 Keb. 259, 260.
1 Vent. 253.
[a] Vide Cro. Ja. 25. Mo. 644. Pl. 819. Noy 41. Cro. Ca. 283.
Cro. Eliz. 20.

Sect. 9. And it is farther enacted by the ſaid Statute, *That every Scri-vener, Broker, Solicitor, and Driver of Bargains for Contracts, who ſhall after the ſaid nine and twentieth Day of* September, *take or receive, directly or indirectly, any Sum or Sums of Money, or other Reward or Thing, for Brokage, Soliciting, Driving or Procuring the Loan, or forbearing of any Sum or Sums of Money, over and above the Rate or Value of five Shillings for the Loan, or forbearing of one hundred Pounds, for a Year, and ſo rateably or above twelve Pence, over and above the Stamp-Duties, for making or re-newing of the Bond or Bill for Loan, or forbearing thereof, or for any Co-terbond or Bill concerning the ſame, ſhall forfeit for every ſuch Offence treble Pounds, with Coſts of Suit, and ſuffer Impriſonment for half a Year, the Moiety of all which Forfeitures ſhall be to the Queen, the other to him that will ſue for the ſame, in the ſame County where the ſeveral Offences are com-mitted,* &c.

The Expoſitions which were made of the former Statutes of Uſury be-ing equally applicable to this which is penned almoſt in the very ſame Words, I ſhall take Notice of the Principal of them; as,

Daliſ. 12. Con. Raym. 197.

Sect. 10. I. That a Contract made before the Statute is no way within the Meaning of it, and therefore that it is ſtill lawful to receive ſix *l. per Cent.* in reſpect of any ſuch Contract.

2 And. 121. Moor 752. Pl. 1035. Cro. Ja. 32, 33. Yel. 47.

Sect. 11. II. That a Bond made to ſecure a juſt Debt payable with lawful Intereſt, ſhall not be avoided by reaſon of a corrupt Agreement between the Obligors, to which the Obligee was no way Privy: as where *A.* being indebted to *B.* in 100 *l.* agrees to give him 30 *l.* for the Forbearance of that 100 *l.* for a Year, and gives him a Bond of 60 *l.* for Payment of the 30 *l.* and for the Payment of the 100 *l.* enters into a Bond of 200 *l.* together with *B.* for the Payment of a true Debt of 100 *l.* from *B.* to *C.*

Sect. 12. III. That the Receipt of higher Intereſt than is allowed by the Statute, by Virtue of an Agreement ſubſequent to the firſt Contract, does not avoid an Aſſurance fairly made, and agreeable to the Statute, but only ſubjects the Party to the Forfeiture of treble Value, for the Words are, *That all Aſſurances for the Payment of any Principal, &c. whereupon or whereby there ſhall be reſerved or taken above the Rate of* 5 l. *in the Hundred, &c. ſhall be utterly void.* 1 Mod. 69. 3 Keb. 142. 2 Mod. 307. 1 Saund. 294. Raym. 196. 2 Keb. 525, 690. 1 Bulſ. 17.

Sect. 13. IV. That in an Aſſurance for the Payment of fifty Shillings for the Uſe of 100 *l.* for ſix Months, the Computation ſhall be by Kalendar and not by Lunar Months, becauſe by the latter the Intereſt would exceed the Rate allowed by the Statute. Noy 37. 1 Leon. 96.

Sect. 14. V. That the Receipt of Intereſt before the Time when it is of Strictneſs due, being voluntarily paid by the Debtor for the greater Convenience of the Creditor, or for any other ſuch like Conſideration, without any Manner of corrupt Practice, or any previous Agreement of this Kind at the making of the firſt Contract, does not make the Party liable to the Forfeiture of the treble Value. 1 Bulſ. 17, 20. Yel. 30, 31. Noy 171. 2 Keb. 690. Con. 1 Leon. 96.

Sect. 15. VI. That the Grant of an Annuity for Lives not only exceeding the Rate allowed for Intereſt, but alſo exceeding the known Proportion for Contracts of this Kind, in Conſideration of a certain Sum of Money, is not within the Meaning of the Statute, unleſs there were ſome underhand Bargain for the Security of the Repayment of the Principal or Conſideration-Money. Cro. Ja. 253. Noy 151. 2 Levinz 7, 8. Vid. 2 Rol. A. 782. H. 1.

Sect. 16. VII. That no Contract is uſurious, by which the Lender runs the Hazard of loſing all his Money, both Principal and Intereſt: As where on the Loan of a certain Sum for a Year, for the Victualling of a Ship, it is agreed, That if the Ship return, the Lender ſhall have ſo many Thouſand Fiſhes at ſuch a Rate, which exceeds the Intereſt allowed by the Statute, and if the Ship never return, or if it periſh by unavoidable Caſualties of Sea, Fire, or Enemies, that then he ſhall have nothing: Or where the Loan of 30 *l.* a Bond is given for the Payment of 100 *l.* on the Marriage of a Daughter of one of the Parties; provided, That if either of them ſhould die before, that then nothing ſhould be paid: But it is clear, that if the Intereſt only be hazarded on ſuch a Contract, and the whole Principal ſecured, the Whole is uſurious. Alſo it hath been reſolved, That an Agreement to pay more than the lawful Intereſt for the Loan of a certain Sum at ſuch a Day, if *A. B.* ſhall be then alive, and if he ſhall be dead, then to pay ſuch a Sum which is leſs than the Principal, is void by the Statute; for if ſuch a Contingency would exempt the Caſe out of the Statute, by the ſame Reaſon twenty Lives might be added, and the Statute wholly evaded. Cro. Ja. 208, 209, 508, 509. 1 Keb. 539, 711. 2 Ro. Re. 48. 1 Lev. 54. 1 Sid 27. 3 Keb. 304. Vide Cro. El. 741. 2 Ro. Re. 48. Cro. Ja. 508. 5 Co. 70. Moor 397. Cro. Eliz. 642, 643, 741. Lutw. 468, 469. Carth. 68.

Sect. 17. VIII. That an Aſſurance made in Purſuance of a fair Agreement for ſuch Intereſt as is allowed by the Statute, ſhall not be avoided by the Fault of the Scrivener, who draws it up in ſuch a Manner as to bring within the expreſs Letter of the Statute: As where the Parties agree, that 5 *l.* ſhall be paid for the Loan of 100 *l.* for a Year, and the Scrivener drawing the Bond for it, doth, without the Knowledge of the Parties, who are illiterate Perſons, make the 5 *l.* payable at the End of half a Year: Whereas on the fair Loan of 100 *l.* agreed to be paid with common Intereſt, a Mortgage is made for the 100 *l.* with a Proviſo, That it ſhall be void on Payment of 105 *l.* at the End of one Year, without any Covenant for the Mortgagor to take the Profits till Default be made of Payment, ſo that in Strictneſs the Mortgagee is intitled both to the Intereſt and Profits. Cro. Ja. 677, 678. 2 Ro. Re. 414, 415. Hetley 11. 1 Jon. 396. Cro. Ca. 501. 2 Ventr. 83. 2 Mod. 307. 2 Rol. A. 793, 798, 5.

Sect. 18.

5 Co. 70. b. *Sect.* 18. IX. That the Loan of Money for lawful Intereſt allowed by the Statute, ſhall not be conſtrued to be within the Purview of it, in reſpect of any Expectations which the Lender may have of a voluntary Gratuity to be given him by the Borrower, if there be no Kind of Agreement relating to it.

5 Co. 69. Cro. Ja. 509. *Sect.* 19. X. That the Reſervation of a greater Sum than is allowed by the Statute for Intereſt, upon the Non-payment of the Principal at the End of the Year is not uſurious within the Statute, becauſe it is in the Power of the Borrower to avoid the Payment of the Money ſo reſerved, by paying the Principal at the Day appointed; yet it ſeemeth clear, That if it were originally agreed, that the principal Money ſhould not be paid at the Time appointed, and that ſuch Clauſe was inſerted only with an Intent to evade the Statute, the whole Contract is void; for the Conſtruction of

5 Co. 69. b. See Mo. 397. 2 And. 16. Caſes of this Nature muſt be governed by the Circumſtances of the whole Matter, from which the Intention of the Parties will appear in the making of the Bargain, which, if it was in Truth uſurious, is void, however it may be diſguiſed by a ſpecious Aſſurance.

[a] 3 Co. 80. 9 Co. 36. b. 1 Jon. 203. 1 Ro. Re. 41, 42. 2 Ventr. 83, 108. 2 Leon. 166. Con. Cro. El. 25, 588. 1 Sid. 182. b. *Sect.* 20. XI. That a [a] Fine levied, or Judgment ſuffered, in Purſuance of an uſurious Contract, may be avoided by an Averment of the corrupt Agreement, as well as any common Specialty, or parol Contract. And in an *Aſſumpſit* [b] if it appear, either upon the Evidence, or from the Plaintiff's own Expreſs Shewing in his Declaration, that the Contract was uſurious, he cannot recover. But a Specialty cannot be avoided by Uſury appearing on Evidence or on the Face of the Condition, but it muſt be pleaded.

[b] Salk. 22. Pl. 2. Skin. 411, 412. [c] Cro. Ja. 252, 508. 2 Rol. Re. 48. 2 Lev. 7, 8. [d] Lutw. 273. 466. [e] Cro. Ja. 440. *Sect.* 21. XII. That it is not [c] material whether the Payment both of the Principal and alſo of the uſurious Intereſt be ſecured by the ſame or by different Conveyances, but that all Writings whatſoever for ſtrengthening ſuch a Contract, are void.

Sect. 22. XIII. That a Contract reſerving to the Lender a greater Advantage than is allowed by the Statute, is equally within the Meaning of it [e] whether the whole be reſerved by way of Intereſt, or in Part only under that Name, and in Part by way of Rent for a Houſe, let at a Rate plainly exceeding the known Value.

3 Keb. 142. Con. Noy 2. *Sect.* 23. XIV. That a ſecond Bond made after the Forfeiture of a former, and conditioned for the Receipt of Intereſt according to the Penalty of the forfeited Bond, is as much within the Statute as if it had been made before the Forfeiture; for if ſuch a Practice ſhould be allowed, nothing could be more eaſy than to elude the Statute; and though the whole Penalty be due in Strictneſs to the Obligee, yet the true principal Debt is in Conſcience no greater after the Forfeiture of the Bond than it was before.

1 And. 49. 1 Sid. 285. 3 Mod. 35. 1 Keb. 629. Noy 143. Cro. Ja. 440. Vide Cro. Ca. 501. Precedents. 2 Vent. 81. Lutw. 468. *Sect.* 24. XV. That in pleading an uſurious Contract by way of Bar to an Action, you muſt ſet forth the whole Matter ſpecially, becauſe it lay within your own Privity; but that in an Information on the Statute for making ſuch a Contract, it is ſufficient to ſet forth the corrupt Bargain generally, becauſe Matters of this Kind are ſuppoſed to be privily tranſacted, and ſuch Information may be brought by a Stranger.

Sect. 25. XVI. [f] That in every ſuch Information it is neceſſary expreſs to ſet forth the Place where the corrupt Bargain was made.

[f] 1 Leon. 96, 97. 1 Leon. 148. 149. *Sect.* 26. XVII. That if an uſurious Contract in the County of *D.* be pleaded in Bar to an Action on a Bond ſaid to be made in the County of *E.* the Trial ſhall be in the County of *D.* becauſe the Ground of the Matter is the uſurious Contract, and the Bond is confeſſed by the Plea.

Sect. 27. XVIII. That he who hath agreed to pay Money upon an uſu- Co. Lit. 6. b.
s Contract, ſhall not be admitted to give Evidence upon an Informa- 2 Rol. A. 685.
against the Uſurer, unleſs he have paid off the whole Debt; for by 2 Raymond
n Means a Man might avoid his own Act and Deed. 191.
B. 2. Ch. 46.
Sect. 28. XIX. That an Information for an uſurious Contract on a Loan Sect. 24.
Money, cannot be ſupported by Evidence of ſuch a Contract on a Bar- 1 Leon. 95, 96.
concerning Wares ſold.

CHAP. LXXXIII.

Of Maintenance.

. 1. MAintenance is commonly taken in an ill Senſe, and in general Co. Lit. 368. b.
ſeemeth to ſignify an unlawful Taking in Hand, or Uphold- 2 Inſt. 208,
of Quarrels or Sides, to the Diſturbance or Hinderance of common 212.
ht, and is ſaid to be twofold:

ect. 2. I. *Ruralis*, or in the Country; as where one aſſiſts another in Co. Lit. 368. b.
Pretenſions to certain Lands, by taking or holding the Poſſeſſion of them 2 Inſt. 213.
him by Force or Subtilty, or where one ſtirs up Quarrels, and Suits in 1 Ric. 1. ch. 4.
Country, in relation to Matters wherein he is no way concerned: And 3 Rol. Abr. 115. F.
Kind of Maintenance is puniſhable at the King's Suit by Fine and Im-
onment, whether the Matter in Diſpute any way depended in Plea or
but is ſaid not to be actionable.

ect. 3. II. *Curialis*, or in a Court of Juſtice, where one officiouſly in- Pult. 25.
meddles in a Suit depending in any ſuch Court which no way belongs to 2 Inſt. 212.
, by aſſiſting either Party with Money or otherwiſe, in the Proſecution 2 Rol. A. 115. F.
Defence of any ſuch Suit.

Of this ſecond Kind of Maintenance there ſeem to be three Species:

1. Where one maintains another without any Contract to have Part of the Thing in Suit, which generally goes under the common Name of Maintenance.
2. Where one maintains one Side, to have Part of the Thing in Suit, which is called Champerty.
3. Where one laboureth a Jury, which is called Embracery.

the better Underſtanding of the firſt of the above mentioned Species, I ſhall examine:

. What ſhall be ſaid to amount to an Act of Maintenance.
. In what Reſpects ſome ſuch Acts may be juſtifyed.
. How far Offences of this Kind are reſtrained by the Common Law.
. How far by Statute.

ect. 4. As to the firſt Point, it ſeemeth clear, That whoever aſſiſts an- [a] 28 H. 6. 7. b. 12. a.
er with Money to carry on his Cauſe, as by retaining one to be of Coun- 34 H. 6. 25, 26. a. b.
for him, or otherwiſe bearing him out in the whole or Part of the 9 E. 4. 32. a.
ence of the Suit, may properly be ſaid to be guilty of an Act of 21 H. 7. 40. b.
intenance, as it ſeems to be taken for granted in the [a] Books cited in the 6 E. 4. 5. b.
rgin. 19 E. 4. 3. b. 31 H. 6. 9. Bro. Maintenance, 7, 14, 17, 20, 24, 43, 44, 52.

ect. 5. Alſo it is ſaid, That not only he who lays out his Money to 2 Rol. A. 118. Pl. 5, 6.
another in his Cauſe, but alſo that he who by his Friendſhip or In-

[a] 28 H. 6. 7. b. 12. b. 34 H. 6. 25. b. 9 E. 3. 32. a. Bro. Maintenance, 6, 7, 20.

tereſt ſaves him that Expence which he might otherwiſe be put to, or but endeavours ſo to do, is alſo guilty of Maintenance; as where [a] one perſwades, or but endeavours to perſwade a Man to be of Counſel for another *gratis.*

[b] 22 H. 6. 5. b. Bro. Maintenance, 14. Cro. El. 735. [c] 28 H. 6. 6. a. 11 H. 6. 41. b. Bro. Maintenance, 5, 51. Fitz. Maintenance, 10. 2 Rol. Abr. Pl. 118. Pl. 7, 8. [d] Hetley 78, 79. [e] 1 Rol. Ab. 593. Pl. 11. [f] 19 E. 4. 3. b. 12 E. 4. 14. b. Hetl. 79.

Sect. 6. Alſo it is ſaid, That all ſuch Perſons may properly be called Maintainers, who give or but endeavour to give any other Kind of Aſſiſtance to either of the Parties, in the Management of the Suit depending between them; as by [b] opening the Evidence to the Jury; or by [c] giving Evidence officiouſly without being called upon to do it; or by ſpeaking in the Cauſe as [d] one of Counſel with the Party; or by [e] retaining an Attorney for him; or [f] perhaps for barely going along with him to enquire for a Perſon learned in the Law.

[g] 22 H. 6. 5. b. Bro. Maintenance, 14. Fitz. Maintenance, 8. [h] 22 H. 6. 6. b. 11 H. 6. 39. b. 19 E. 4. 3. b. Bro. Maintenance, 51. [i] 9 H. 7. 18. b. Bro. Champerty, 9.

Sect. 7. Alſo it hath been ſaid, That thoſe ſhall come under the Notion, who give any publick Countenance to another in Relation to any ſuch Suit; as where one of great Power and Intereſt ſays [g] publickly, That he will ſpend twenty Pounds on one Side, or that he will give twenty Pounds to labour the Jury, whether in Truth he ſpend one Penny or not; or where ſuch a Perſon [h] comes to the Bar with one of the Parties, and ſtands by him while his Cauſe is tried, whether he ſay any Thing or not; for ſuch Kinds of Practices do not only tend to diſcourage the other Party from going on in his Cauſe, but alſo to intimidate Juries from doing their Duty. But it ſeems, That a bare [i] Promiſe to maintain another, is not in it ſelf Maintenance, unleſs it be either in reſpect of the publick Manner in which, or the Power of the Perſon by whom it is made.

[k] Bro. Maintenance 40. 18 E. 4. 1. Pl. 6. 2. Pl. 8. 17 E. 4. 5. b. Bro. Maintenance, 39.

Sect. 8. Alſo it is ſaid to be as much Maintenance for a [k] Juror, as for any other Perſon, to ſollicit a Judge to give Judgment according to the Verdict, becauſe after a Juror has given his Verdict, he has nothing more to do: But it is ſaid to be no [k] Maintenance for a Juror to exhort his Companions to join with him in giving ſuch a Verdict as ſeems to him to be right.

[l] 12 E. 4. 14. b. 19 E. 4. 3. b. 22 H. 6. 35. a. Bro. Maintenance, 17. 3 Rol. Ab. 118. Pl. 2. Fitz. Maintenance, 21.

Sect. 9. However it ſeems clear, [l] That a Man is in no Danger of being judged guilty of an Act of Maintenance, for giving another friendly Advice, what Action is proper for him to bring for the Recovery of a certain Debt, or what Method is ſafeſt to take to free him from ſuch an Arreſt, or what Counſellor or Attorney is likely to do his Buſineſs moſt effectually; for it would be extreamly hard to make ſuch neighbourly Acts of Kindneſs, which ſeem rather commendable than blame-worthy, to come under the Notion of Maintenance, which always ſeems to imply a contentious, and over-buſy intermeddling in other Mens Matters, in which reſpect it is ſo highly Criminal. Yet it is ſaid, that a Man of great Power and learned in the Law, may be guilty of Maintenance, by telling another who aſks his Advice, that he has a good Title.

3 H. 6. 54. a. Fitz. Maintenance, 18. Bro. Maintenance, 1.

Sect. 10. Alſo it hath been ſaid, That no one can be guilty of Maintenance, in reſpect of any Money given by him to another before any Suit is actually commenced; yet if it plainly appear, That it was given merely with a Deſign to aſſiſt him in the Proſecution or Defence of an intended Suit, which afterwards is actually brought; ſurely it cannot but be as great a Miſdemeanor in the Nature of the Thing, and equally criminal at Common Law, as if the Money were given after the Commencement of the Suit, though perhaps it may not in Strictneſs come under the Notion of Maintenance.

47 Ed. 3. 10. a. Bro. Champerty, 2.

Sect. 11. However it is certain, That one may as properly be ſaid to be guilty of Maintenance, within the Meaning of the Words *adhuc*

utenet, in an Action of Maintenance, for ſupporting another after Judgnent, as for doing it hanging the Plea; becauſe the Party grieved may be diſcouraged thereby from bringing a Writ of Error or Attaint.

As to the ſecond Point, *viz.* In what Reſpects ſome Acts of this Kind may be juſtified, I ſhall conſider the following Particulars:

1. How far they are juſtifiable in Reſpect of an Intereſt in the Thing in Variance.
2. How far in Reſpect of Kindred or Affinity.
3. How far in Reſpect of other Relations.
4. How far in Reſpect of Charity.
5. How far in Reſpect of the Profeſſion of the Law.

Sect. 12. As to the firſt of theſe Particulars, *viz.* How far ſome Acts f this Kind are juſtifiable in Reſpect of an Intereſt in the Thing in Vance, it ſeemeth to be clearly agreed, That if a [a] Tenant in Tail, or for fe, be impleaded, he in Remainder or Reverſion may lawfully maintain e Defence of the Suit with his own Money: And upon the like Ground ſeems to be clear, That if in an Action of Treſpaſs, *&c.* brought by or ainſt a [b] Leſſee for Years, the Inheritance come into Queſtion, the Leſſor y lawfully maintain his Leſſee, and give [c] Evidence to prove the Inheriice in himſelf; for though the Judgment which may be given againſt the ſſee cannot directly bind his Inheritance, yet the Verdict may be a Prejuce to his Title, being given on a Suppoſal of his not having a good one: ſo it hath been [d] admitted as clear Law, That if one ſeized in Fee of cern Land, bring an Action of Treſpaſs, *quare Clauſum fregit*, and then en the Land, and afterwards in the Trial of the Cauſe it be queſtioned hether the Inheritance at the Time of the ſuppoſed Treſpaſs belonged to Plaintiff or Defendant, the Alienee may lawfully produce Evidence to ve that the Inheritance was in the Plaintiff, becauſe the Plaintiff's Title ow become his own.

[a] 19 E.4. 3.b. 9 H. 6. 64. Bro. Maintenance, 3, 53. 2 Rol. A.117. O. 2.
[b] 6 E. 4. 2. b. 2 Rol. Ab. 117. O. 3. Bro. Maintenance, 33.
[c] 39H.6.20.a. Bro. Maintenance, 28.
[d] 14 H.6. 7.b. Bro. Maintenance, 23. 2 Rol. Ab. 117. O. 4.

Sect. 13. Alſo it hath been ſaid, that not only thoſe who have a certain tereſt, but alſo that thoſe who have a bare Contingency of ſuch an Inte- in the Lands in Queſtion, which poſſibly may never come *in eſſe*, may like manner lawfully maintain another in an Action concerning ſuch nds; from whence it follows, That if I grant to *B.* that if my Leſſee Life ſhall die during my Life, that then he ſhall have the Land for ten ars, and after my Leſſee be impleaded, *B.* may maintain him.

9 H. 6. 64. A. B. 2 Rol. Ab. 117. O. 5.

Sect. 14. And it hath been ſaid, That not only thoſe who have a Congency of ſuch an Intereſt, which it is in no Man's Power to bar them of, he Contingency happen, may juſtify ſuch Maintenance, but that thoſe alſo ll have the ſame Privilege, who by the Act of God, have the immediate ſſibility of ſuch an Intereſt, though it be in the Power of another to deve them of it; and therefore that an Heir Apparent, or the Huſband of h an Heir, may lawfully maintain the Anceſtor in an Action concern- the Inheritance of the Land whereof he is ſeiſed in Fee.

14 H. 7. 2. a. 19 Ed. 4. 3.b. 21 H.6. 16.b. 2 Inſt. 564. 2 Rol.A.115. H, I.

Sect. 15. But it is ſaid, That the Grantee of a Reverſion, before the Statute for Amendment of the Law which made all Attornment need-, could not maintain the Tenant of the Land without Attornment, cauſe his Poſſibility was wholly created by the Act of the Party, and uld not be executed but by the voluntary Attornment of the Tenant, ich there was no Remedy to compel him to make by the Common w; but perhaps the Authority of this Opinion may be queſtionable, ecially if ſuch Grant were made for good Conſideration: For ſince oſe who have only an equitable Intereſt in Lands, may lawfully maintain

9 H. 6. 64. a. 2 Rol. Ab. 117. Pl. 7.

tain others in Actions relating to thoſe Lands, as ſhall more fully be ſhewn in the ſeventeenth Section; and ſince the Grantor in Equity ſhall ſtand in-
34 H. 6. 30. b. truſted for the Grantee after the Grant, and the Tenant may be enforced by a Court of Equity to attorn to him, I do not ſee any good Reaſon why ſuch Grantee ſhould be eſteemed ſuch a Stranger to the Land, that he may not lawfully defend an Action concerning it, in the Event whereof he is ſo nearly concerned.

11 H. 6. 41. Bro. Maintenance, 51. 2 Rol. Ab. 118. Pl. 8. *Sect.* 16. But it ſeems clear, That he who is bound to warrant Lands may lawfully maintain the Tenant in the Defence of his Title, becauſe he is bound by the Warranty to render other Lands to the Value of thoſe which ſhall be evicted.

Sect. 17. Alſo it ſeems to be agreed, That he who hath an equitable Intereſt in Lands or Goods, or even in a Choſe in Action, may lawfully maintain another in an Action relating thereto; and therefore it ſeemeth to
[a] 34 H. 6. 30. b. 15 H. 7. 2. a. 2 E. 4. 2. a. Bro. Maintenance, 19, 30. be clear, That a Man may lawfully [a] maintain thoſe who are infeoffed of Lands in Truſt for him, in any Action concerning thoſe Lands, and that if he ſell them to another, the Vendee ſhall have the ſame Privilege; alſo it
[b] Noy 100. Moore 620. Pl. 847. See 39 H. 6. 19. b. 20. a. Fitz. Maintenance, 14. hath been [b] reſolved, That where *A.* was bound as a Surety for *B.* and he thereupon made a Deed of Gift of certain Sheep to *A.* in order to ſave him harmleſs from the ſaid Bond, with an implied Truſt that the Sheep ſhould be returned to *B.* if *A.* ſhould not be damnified, and afterwards an Action was brought againſt *A.* for the Taking of the Sheep, *B.* might juſtify the Maintaining of him in reſpect of the ſaid Truſt: Alſo it ſeemeth to be
[c] 34 H. 6. 30. b. 15 H. 7. 2. a. Noy 52. Cro. El. 552. 1 Sid. 217. Bro. Maintenance, 19. certain, That the Aſſignee of a Bond, or other Choſe in Action, being made over to him for good Conſideration, in Satisfaction of a precedent Debt due *bona fide* to him, and not merely in Conſideration of the intended Maintenance, may either maintain the Obligee in an Action brought by him for the Debt, or commence an original Action in his Name, for he hath an equitable Intereſt in the Debt.

[d] 18 Ed. 4. 2. b. Bro. Maintenance, 41. Hob. 92. 2 Rol. Ab. 118. Pl. 8. Noy 99. Moore 562. Pl. 764, 788. Pl. 1088. 1 Rol. Re. 57. *Sect.* 18. Alſo it ſeemeth to be [d] agreed, That where-ever any Perſons claim a common Intereſt in the ſame Thing, as in a Way, Church-yard, or Common, *&c.* by the ſame Title, they may maintain one another in a Suit relating to the ſame.

[e] 34 H. 6. 26. a. 14 H. 6. 6. b. 18 Ed. 4. 12. b. *Sect.* 19. It is ſaid, That he who is [e] Bail for another, may take Care to have his Appearance recorded, but that he ought not to intermeddle any farther.

[f] 20 H. 6. 1. 6 Ed. 4. 5. b. 14 H. 7. 2. a. [g] 6 Ed. 4. 5. b. Fitz. Maintenance, 16. [h] 21 H. 6. 15. b. 11 H. 6. 41. b. 42. a. 12 H. 6. 2. Pl. 7. 19 Ed. 4. 3. b. 9 H. 6. 64. a. 9 Ed. 4. 32. a. [i] 19 Ed. 4. 5. a. 2 Inſt. 564. 6 Ed. 4. 5. [k] 21 H. 6. 16. b. 2 Inſt. 564. Vide ſupra Sect. 14. *Sect.* 20. As to the ſecond of the ſaid Particulars, *viz.* How far ſome Acts of this Kind are juſtifiable in reſpect of Kindred or Affinity, it ſeems to be agreed, That whoever is any way of Kin or Affinity to either of the Parties, ſo long as the ſame [f] continues, or but related to him by being [g] Godfather, may lawfully [h] ſtand by him at the Bar, and counſel and aid him, and alſo pray another to be of Counſel to him, but that he cannot juſtify the laying out of any of his own [i] Money in the Cauſe, unleſs he be either [k] Father, or Son, or Heir Apparent to the Party, or the Huſband of ſuch an Heireſs.

As to the third of the ſaid Particulars, *viz.* How far ſome Acts of Maintenance are juſtifiable in reſpect of other Relations, I ſhall conſider,

1. How far a Lord may maintain his Tenant.
2. How far a Tenant may maintain his Lord.
3. How far a Maſter may maintain his Servant.
4. How far a Servant may maintain his Maſter.
5. How far one Neighbour may maintain another.

Sect. 21. As to the firſt Point it ſeems certain, That not only the Lord, but alſo the *Ceſtui que Uſe* of a Seigniory, may come with the enant to a Trial in an Aſſize againſt him, and ſtand by him and aſſiſt m, and alſo pray the Sheriff to return an indifferent Jury: Alſo it ſeem- h, That the [b] Lord of a Town in an Action brought againſt the Inha- tants, wherein a Right to a common Burying-place, claimed by them, brought into Queſtion, may maintain them in the Defence of their ght, by ſhewing authentick Evidence thereof to the Jury: And in ſome Books it is ſaid generally, That the Lord may maintain his Tenant, ithout ſaying, how far he may do it; and I do not find it any where preſly holden, That the Lord may juſtify laying out his own Money Defence of his Tenant's Title; but it ſeemeth the better Opinion, That may as well juſtify it as any other of the above mentioned Acts of aintenance; for the Lord, by accepting a Man for his Tenant, ſeemeth take him under his immediate [d] Protection; and inaſmuch as the Lands re originally derived from the Lord, and he hath the continual Benefit the Services due from them, the Law in many Caſes of [e] Common ht, obliges him to warrant them unto his Tenant, and where it doth oblige him, ſurely it will at leaſt permit him to do it: But it [f] ſeems r, That he cannot maintain him in reſpect of any Lands not holden him.

Sect. 22. As to the ſecond Point, *viz.* How far a Tenant may main- his Lord, it is ſaid, That he may juſtify [g] Coming with his Lord, Standing with him at a Trial; but I cannot find any Thing more re- ng to this Matter in any of the Books.

Sect. 23. As to the third Point, *viz.* How far a Maſter may main- his Servant, it is ſaid, That the Maſter may go along with his [h] Ser- t, or with his [i] Chaplain, being retained to live in his Houſe with him, rder to [k] retain Counſel, and that he may pray one to be of Counſel him, and alſo that he may go with him to the [l] Trial and ſtand with and aid him while the Cauſe is tried, but ought not to ſpeak in the rt in favour of his Cauſe. Alſo it is ſaid, That if my Servant be ar- ed in an Action of [m] Debt, I may aſſiſt him with Money in order to him out of Priſon, that I may have the Benefit of his Service: it is ſaid, That the Maſter, in real Actions, cannot juſtify Laying out ney for his Servant, unleſs he hath ſome of his Wages in his Hand; ch, if the Servant be willing, the Maſter may ſafely lay out on his alf.

Sect. 24. As to the fourth Point, *viz.* How far a Servant may main- his Maſter, it ſeemeth clear, That a Perſon generally retained by ano- as his Servant to do all manner of Services, and not for a [n] particular aſion only, may juſtify [o] Riding about to ſpeed his Buſineſs, and Going Counſel in his Behalf, and Shewing his Evidences to the Counſel or to Jury, and [q] Standing by him at a Trial between him and another; but certain, that he cannot lawfully lay out any of his own [r] Money to the Maſter in his Suit.

Sect. 25. As to the fifth Point, *viz.* How far one Neighbour may aſſiſt her, it ſeems clear, That a Man may lawfully go with his [s] Neighbour nquire for a Perſon learned in Law, but that he [t] ought not to give him Money towards carrying on his Suit.

Sect. 26. As to the fourth Inſtance wherein ſome Acts of this Kind juſtifiable, *viz.* That relating to Charity, it ſeems to be [u] agreed, That one may lawfully give Money to a poor Man to enable him to carry his Suit. Alſo it hath been adjudged, That any one may ſafely go with

[a] 11 H.6.39.b. 40.a. 2 Rol. Ab. 117. N. Bro. Maintenance 50.
[b] 18 Ed.4.2.b. Bro. Maintenance 41. 2 Rol. Ab. 116. G.
[c] 9 H.6.64.a. Bro. Maintenance 3.
[d] Co. Lit.65.a.
[e] Co. Lit.101, 384.
11 H.6.42.a. 2 Rol. A.117.
[f] Fitz.Maintenance 25.
[g] 11 H.6.42.a. 2 Rol. Ab. 116. K.
[h] Hetley 79.
[i] 19 H.6.30.b.
[k] 28 H.6.7.b. 12.b. 13.b. 34 H.6.25.b. 26. a. b. Bro. Maintenance 6, 14. Fitz. Maintenance 20. Con. Fitz. Maintenance 13.
[l] 19 H.6.30.b. 11 H.6.42.a. 2 Rol. Ab. 116. K. Hetley 79.
[m] 21 H.7.40.b. Moor 814. Bro. Maintenance 24. 31 H.6.9.b. 19 Ed.4.3.b. 2 Rol. Ab. 116. K. Hetley 79.
Bro. Maintenance 44, 52.
[n] 39 H.6.5.b. 6.a. Con. Keil. 50. b.
[o] 19 E.4.3.b.
[p] 19 H.6.31.b.
[q] 11 H.6.42.a.
[r] 3 H.6.53.b. 54.a. 11 H.6.10.b. 11.a.
[s] 19 E.4.3.b.
[t] 12 Ed.4.14.b. 19 E.4.3.b. 2 Rol. A.118.
[u] 21 H.6.16.b. 9 H.6.64.a. 22 H.6.35.a. Bro. Maintenance 14.

[a] 19E. 4. 3. b. 34H. 6. 25. b. 15H. 7. 2. a. Bro. Maintenance 7.

with a [a] Foreigner who cannot ſpeak *Engliſh*, to a Counſellor, and inform him of his Caſe.

As to the fifth Inſtance wherein ſome Acts of this Kind may be juſtified, *viz.* that relating to the Profeſſion of the Law, I ſhall conſider,

1. How far they are juſtifiable in a Counſellor.
2. How far in an Attorney.

[b] 11H. 6. 10. b. 11. a. 2 Rol. Ab. 116. M. 2 Inſt. 564. [c] Fitz. Maintenance 8. 22 H. 6. 6. [d] 13H. 4. 16. b. Kellway 50. b. Hob. 117. 2 Inſt. 564. 2 Rol. Abr. 116. M. Fitz. Maintenance 21. [e] 3 Mod. 98. Vid. 2 Danv. 487, 12, 13, 14. Winch 52. 1 Jon. 208. Cro. Ca. 159, 194. Con. Cro. El. 425, 459, 760. Moor 366. Pl. 500. 2 Rol. Ab. 114. Pl. 4. 115. Pl. 6. [f] 2 Rol. Ab. 114. Pl. 5. 2 Rol. Ab. 115. Pl. 6. Winch 53. [h] 2 Inſt. 214.

Sect. 27. As to the firſt Point, there is no Doubt but that a [b] Counſellor, having received his Fee, may lawfully ſet forth his Client's Cauſe to the beſt Advantage; but it is certain, That he can no more juſtify [c] giving him Money to maintain his Suit, or threatening a Juror, than any other Perſon.

Sect. 28. As to the ſecond Point, there is no Doubt but that an Attorney may [d] lawfully proſecute or defend an Action in the Court wherein he is an allowed Attorney, in the Behalf of any one by whom he ſhall be ſpecially retained, and that he may aſſiſt his Client, by laying out his own Money for him to be repaid again, and alſo may maintain an Action againſt him for the ſame by Virtue of ſuch a Retainer, without any ſpecial Promiſe; and it is ſaid alſo, That Attornies may juſtify ſuch Maintenance in other Courts, wherein they are not [e] allowed Attornies, but that they cannot have an Action for the Money ſo laid out without a ſpecial Promiſe, and that they are more juſtified by a general [f] Retainer to proſecute for another all his Cauſes, than if they were not retained at all; and it is certain that they ought not to carry on a Cauſe for another at their own Expence, with a Promiſe never to expect a Repayment. And it [g] ſeems juſtly queſtionable, whether Sollicitors who are not Attornies, can in any Caſe juſtify the Laying out their Money in another Suit.

Sect. 29. However it is certain, That no Counſellor or Attorney can juſtify the Uſing any deceitful Practice, in Maintenance of a Client's Cauſe, and that they are liable to be ſeverely puniſhed for all Miſdemeanours of this Kind, not only by the [h] Common Law, but alſo by Statute; for it is enacted by *Weſtminſter* 1. 28. *That if any Serjeant, Pleader, or other do any manner of Diſceit or Colluſion in the King's Court, or conſent unto it in Diſceit of the Court, or to beguile the Court of the Party, and thereof be attainted, he ſhall be impriſoned for a Year and a Day, and from thenceforth ſhall not be heard to plead in that Court for any Man. And if he be no Pleader, he ſhall be impriſoned in like manner by the Space of a Year and a Day at the leaſt. And if the Treſpaſs require greater Puniſhment, it ſhall be at the King's Pleaſure.*

In the Conſtruction of this Statute the following Points have been holden,

11 E. 4. 3. b. Bro. Diſceit, 28. 2 Inſt. 215, 216. Dyer 249. Pl. 84. 2 Inſt. 215. F. N. B. 98.

Sect. 30. I. That Counſellors, *&c.* who are not ſworn, are as much within the Meaning of it as Serjeants, *&c.* who are ſworn.

Sect. 31. II. That all Fraud and Falſhood, tending to impoſe upon or abuſe the Juſtice of the King's Courts, are within the Purview of it, as the following Inſtances:

Sect. 32. Firſt, Where an Attorney ſues out an *Habere facias* [*poſſeſſionem*], falſly reciting a Recovery in a real Action, where in Truth no

as no Recovery at all, and by Colour thereof puts the ſuppoſed Tenant the Action out of his Freehold.

Sect. 33. Secondly, Where one brings a *Præcipe* againſt a poor Man, nowing that he had nothing in the Land, on Purpoſe to get the Poſſeſſion om the true Tenant. 2 Inſt. 215.

Sect. 34. Thirdly, Where one procures an Attorney to appear for a an, and confeſs Judgment without any Warrant. 41 E. 3. 1. b. 2 Inſt. 215. Dy. 362. Pl. 13.

Sect. 35. Fourthly, Where one pleads a falſe Plea, known to be utterly oundleſs, and invented merely with a Deſign to delay Juſtice, and abuſe e Court; and therefore it is ſaid, That if a Client deſire his Attorney to ead ſuch a Plea, the Attorney ought to enter upon the Roll, *Non ſum ve-citer informatus, ideo nihil dicit.* 10 E. 4. 9. b.

Sect. 36. As to the third general Point of this Chapter, How far Of-ces of this Kind are reſtrained by the Common Law, it ſeemeth, That Maintenance is ſtrictly prohibited by the Common Law, as having a nifeſt Tendency to Oppreſſion, by encouraging and aſſiſting Perſons to ſiſt in Suits, which perhaps they would not venture to go on in upon ir own Bottoms; and therefore it is ſaid, That all Offenders of this Kind not only liable to an [a] Action of Maintenance at the Suit of the Party ved, wherein they ſhall render ſuch Damages as ſhall be anſwerable to Injury done to the Plaintiff, but alſo that they may be [b] indicted as Of-ders againſt publick Juſtice, and adjudged thereupon to ſuch Fine and priſonment, as ſhall be agreeable to the Circumſtances of the Offence. o it ſeemeth, That a Court of Record may commit a Man for an [c] Act of intenance done in the Face of the Court. 2 Inſt. 208, 212. 2 Inſt. 208. 212. [a] 11 H. 6. 11. a. 2 Inſt. 208. 2 Rol. Ab. 114. D. [b] 8 H. 5. 8. a. 2 Rol. Ab. 114. D. [c] Hetley 79.

Sect. 37. As to the Fourth general Point of this Chapter, How far fences of this Kind are puniſhed by the Statute, it is enacted by 1 *Ed.* 3. which was farther enforced by 20 *Ed.* 3. 4. *That none of the King's Mi-ers, nor no Great Man of the Realm, by himſelf nor by other, by ſending Letters, nor otherwiſe, nor none other great nor ſmall, ſhall take upon them maintain Quarrels nor Parts in the Country, to the Let and Diſturbance of Common Law.*

Sect. 38. And it is farther enacted by 1 *R.* 2. 4. *That none of the King's nſellors, Officers or Servants, nor any other Perſon within the Realm of gland, of whatſoever Eſtate or Condition they be, ſhall take or ſuſtain any arrel by Maintenance, in the Country or elſewhere, upon grievous Pain, t is to ſay, the ſaid Counſellors and the King's Great Officers, upon a Pain ich ſhall be ordained by the King himſelf, by the Advice of the Lords of his alm; and other leſs Officers and Servants of the King's, as well in the Ex-quer, and all his other Courts and Places, as of his own Meiny, upon in to loſe their Offices and Services, and to be impriſoned, and then to be ſomed at the King's Will, every of them according to their Degree, Eſtate, Deſert: And all other Perſons through the Realm, upon Pain of Impriſon-t, and to be ranſomed as aforeſaid.*

n the Conſtruction of theſe Statutes the following Points have been holden:

Sect. 39. I. That Maintenance of a Suit in a Court-Baron is as much hin the Purview thereof as Maintenance in a Court of Record. Fitz. Maintenance 24. 3 H. 6. 53. b. 54. a.

Sect. 40. II. That *Nul tiel Record* is a good Plea to an Action of intenance brought on theſe Statutes; and therefore, That he who barely ſts another in taking out an Original, which never is returned, is not li- to any ſuch Action. Bro. Maintenance 1. Fitz. Maintenance 18.

Sect. 41.

Fitz. Maintenance 17, 26.

Sect. 41. III. That it is not material, whether the Plaintiff in an Action on the ſaid Statutes were nonſuited, or recovered in the Action wherein the Maintenance is ſuppoſed.

Reg. 182. b.

Sect. 42. Alſo it is certain, That he who fears that another will maintain his Adverſary, may by way of Prevention have an original Writ grounded on the ſaid Statute prohibiting him ſo to do.

Sect. 43. Alſo all Perſons are prohibited to give or receive any Liveries or Badges for Maintenance, under ſevere Penalties, by 1 *R.* 2. 7. 7 *H.* 4. 14. 13 *H.* 4. 3. 8 *H.* 6. 4. and 8 *E.* 4. 2.

Sect. 44. And it is farther enacted by 32 *H.* 8. 9. *That no Perſon whatſoever ſhall unlawfully maintain, or cauſe or procure any unlawful Maintenance in any Action, Demand, Suit, or Complaint in any of the King's Courts of the Chancery*, Whitehall, *or elſewhere, where any Perſon ſhall have Authority by Virtue of the King's Commiſſion, Patent or Writ, to hold Plea of Lands or to examine, hear or determine any Title of Lands, or any Matter of Witneſſes, concerning the Title, Right, or Intereſt of any Lands, Tenements, or Hereditaments; and alſo that no Perſon whatſoever do unlawfully retain, by Maintenance of any Suit or Plea, any Perſon or Perſons, or embrace any Freeholders or Jurors, or ſuborn any Witneſs by Letters, Rewards, Promiſes, or any other ſiniſter Labour or Means, for to maintain any Matter or Cauſe, to the Diſturbance or Hindrance of Juſtice, or to the Procurement, by Occaſion of any manner of Perjury by falſe Verdict or otherwiſe, in any manner of Courts aforeſaid, upon Pain to forfeit for every ſuch Offence ten Pounds, the one Moiety thereof unto the King, and the other Moiety to him that will ſue for the ſame by Action of Debt*, &c.

Sect. 45. It ſeemeth that in an Information on this Statute it is not

Savil 41, 42.

ſufficient to ſay, That the Defendant maintained the Party without adding that he did it unlawfully.

Noy 68. Cro. E. 594.

Sect. 46. Alſo it is ſaid to have been adjudged, That Maintenance of a Suit in a Spiritual Court, is neither within this nor any of the other above mentioned Statutes concerning Maintenance.

Savil 41, 42.

Sect. 47. Alſo it hath been holden, That in an Information on this Statute, it is neceſſary to ſhew that a Plea was depending, and therefore that it is not ſufficient to ſay that a Bill was exhibited.

CHAP. LXXXIV.

Of Champerty.

2 Inſt. 208. Co.Lit.368.b.

Sect. 1. AND now we are come to the ſecond Species of Maintenance called Champerty, which is the unlawful Maintenance of a Suit in Conſideration of ſome Bargain to have Part of the Thing in Diſpute or ſome Profit out of it.

Sect. 2. Having ſhewn in the precedent Chapter what ſhall amount to an Act of Maintenance, and how far all Maintenance in general, and conſequently Champerty, is puniſhable by the Common Law; I ſhall only take Notice in this Place, how far this Offence in particular is reſtrained by Statute, and to that End ſhall ſet down in Order the ſeveral Statutes relating to it, and ſhew in what Manner they have been expounded.

Sect. 3. And first, it is enacted by the Statute of *Westminster* 1. 25. *That Officers of the King by themselves nor by other, shall maintain Pleas, Suits, Matters hanging in the King's Courts, for Lands, Tenements, or other things, for to have Part or Profit thereof by Covenant made between them; and he that doth, shall be punished at the King's Pleasure.*

In the Construction of this Statute the following Opinions have been holden:

Sect. 4. I. That by the King's Courts therein mentioned, are intended only his Courts of Record. — 2 Inst. 208.

Sect. 5. II. That under the Word Covenant, which in a strict Sense signifieth only an Agreement by Deed, all Kinds of Promises and Contracts of this Kind are included, whether they be made by Writing or Parol. — F.N.B.172.L. 2 Inst. 209, 563.

Sect. 6. III. That Maintenance in personal Actions to have Part of the Debt or Damages, is as much within this Statute as Maintenance in real Actions for a Part of the Land. — 47 Ass. Pl. 5. 47 Ed. 3. 9.b.

Sect. 7. IV. That Maintenance in Consideration of a Rent granted out of Land in Variance, is within this Statute, but that Rent granted out of other Lands is no way within the Purview of it. — F. N. B. 172. K, M. 2 Inst. 209. 47 Ed. 3. 9.b.

Sect. 8. V. That it hath been holden not to be material, whether he who brings a Writ of Champerty, did in Truth suffer any Damage by it, or whether the Plea wherein it is alledged be determined or not. — 47 Ass. 5. Con. 9 H. 7. 18. b. Fitz. Champerty, 4. Bro. Champerty, 2.

Sect. 9. VI. That [a] Maintenance of the Tenant or Defendant is as much within the Meaning of the Statute, as the Maintenance of a Defendant or Plaintiff. — [a] 21 E.3.52.a. 30 Ed. 3.3.b. 4. a.

Sect. 10. VII. That [b] such Grants only of Part of the Thing in Suit, which are made merely in Consideration of the Maintenance are within the Meaning of the Statute, and not such as are made in Consideration of a precedent honest Debt, which is agreed to be satisfied with the Thing in Demand when recovered. — 2 Rol. Ab. 113. Pl. 3. [b] 15 H.7. 2.a. Bro. Champerty, 6.

Sect. 11. And it is farther enacted by the Statute of *Westminster*, 2. 49. *That the Chancellor, Treasurer, Justices, nor any of the King's Counsel, no Clerk of the Chancery, nor of the Exchequer, nor any Justice or other Officer, nor any of the King's House, Clerk nor Lay, shall not receive any Church, nor Advowson of a Church, Land, nor Tenement in Fee, by Gift, or by Purchase, or to Farm, nor by Champerty, nor otherwise, so long as the Thing is in Plea before the King, or before any of his Officers, nor shall take no Reward thereof. And that he that doth contrary to this Act, either himself or another, or make any Bargain, shall be punished at the King's Pleasure, as well he that purchaseth as he that doth sell.*

In the Construction of this Statute the following Opinions have been given:

Sect. 12. I. That it extendeth only to the Officers therein named, and not to any other Persons. — 2 Inst. 484, 485. [c] 2 Inst. 485.

Sect. 13. II. That it so strictly restrains all such Officers from purchasing any Land hanging a Plea, that they cannot be excused by a Consideration of [c] Kindred or Affinity, and that they are within the Meaning of the Statute by barely making such a Purchase, whether [d] they maintain the Party in his Suit or not, [e] whereas such a Purchase for good Consideration, made by any other Person, of any Ter-tenant, is no Offence, unless it appear that he did it to maintain the Party. — [d] 2 Inst. 484. 50 Ass. Pl. 3. Bro. Champerty, 8. Fitz. Champerty, 6. [e] 22 E. 3. 10. b. 52. a. 2 Inst. 484. F. N. B. 172. D, E.

Sect. 14. And it is farther enacted by 28 *E.* 1. 11. in the following Words, *becauſe the King hath heretofore ordained by Statute, That none of his Miniſters ſhall take no Plea for Maintenance, by which Statute other Officers were not bounden before this Time, the King will that no Officer, nor any other, (for to have Part of the Thing in Plea) ſhall not take upon him the Buſineſs that is in Suit; nor none upon any ſuch Covenant ſhall give up his Right to another; and if any do and be attainted thereof, the Taker ſhall forfeit unto the King ſo much of his Lands and Goods, as doth amount to the Value of the Part that he hath purchaſed for ſuch Maintenance. And to obtain this, whoſoever will, ſhall be received to ſue for the King before the Juſtices before whom the Plea hangeth, and the Judgment ſhall be given by them. But it may not be underſtood hereby, that any Perſon ſhall be prohibited to have Counſel of Pleaders, or of learned Men in Law, for his Fee, or of his Parents and next Friends.*

In the Conſtruction of this Statute the following Points have been holden:

Sect. 15. I. That a [a] Conveyance executed, hanging a Plea, in Purſuance of a Bargain made before, is not within the Meaning of it.

Sect. 16. II. That Champerty in any Action at [b] Common Law, whether it be real, perſonal, or mixt, is within this Statute: Alſo it ſeems the better Opinion, That the Purchaſe of Land while a Suit of [c] Equity concerning it is depending, is within the Purview of it.

Sect. 17. III. That a [d] Leaſe for Life, or Years, or a voluntary Gift of Land, hanging a Plea, is as much within the Statute as a Purchaſe for Money.

Sect. 18. IV. That a Surrender made by a [e] Leſſee to his Leſſor is not within the Meaning of the Statute; for ſince the Leſſor may lawfully maintain his Leſſee without ſuch a Surrender, as hath been more fully ſhewn in the precedent Chapter, ſurely *à fortiori*, he may do it after the Surrender.

Sect. 19. V. That no [f] Conveyance, or Promiſe thereof, relating to Lands in Suit, made by a Father to his Son, or by any Anceſtor to his Heir Apparent, is within the Statute, ſince it only gives them the greater Encouragement to do what by Nature they are bound to do.

Sect. 20. VI. That the [g] Giving of Part of the Land in Suit, after the End of it, to a Counſellor for his Wages, is not within the Meaning of it, if it evidently appears that there was no Kind of precedent Bargain relating to ſuch Gift; but it ſeems [h] dangerous to meddle with any ſuch Gift, ſince it cannot but carry with it a ſtrong Preſumption of Champerty.

[a] 30 Aſſ. Pl. 15. 8 Ed. 4. 13. 2 Inſt. 563. Fitz. Champerty, 13. F. N. B. 172. D.

[b] 47 Ed. 3. 9. b. 47 Aſſ. 5. 2 Inſt. 563.

[c] Moore 655. Pl. 898. Con. 2 Rol. Ab. 113. Pl. 2.

[d] 8 E. 4. 13. b. Bro. Champerty, 10. F. N. B. 172. C.

[e] F. N. B. 172. E. 2 Inſt. 564.

[f] 2 Inſt. 564. F. N. B. 172. H.

[g] 13 H. 7. 17. a. Bro. Champerty, 3.

[h] 2 Inſt. 564.

CHAP. LXXXV.

Of Embracery.

FOR the better Understanding of the Nature of Embracery, I shall consider,

1. What Kind of Maintenance comes under the Notion of Embracery.
2. What Acts of this Nature are altogether unlawful.
3. In what Circumstances some Kinds of them may be lawful.
4. How far this Offence is restrained by the Common Law.
5. How far by Statute.

Sect. 1. As to the first Point it seems clear, That [a] any Attempt whatever to corrupt, or influence, or instruct a Jury, or any way to incline them to be more favourable to the one Side than to the other, by Money, Promises, Letters, Threats, or Perswasions, except only by the Strength of the Evidence and the Arguments of the Counsel in open Court, at the Trial of the Cause, is a proper Act of Embracery, [b] whether the Jurors, to whom such Attempt is made give any Verdict or not, or whether the Verdict given be true or false.

[a] F.N.B.171. B, C. Co.Lit.369.a. Moore 815. Pl. 1104.

[b] 21 H.6. 20.a. 22 H. 6. 5.b. 37 H.6. 31.a. Bro. Decies tantum, 10, 11, 13. Co.Lit.369.a. Mo. 815. Pl. 1104.

Sect. 2. [c] And the Law so far abhors all Corruption of this Kind that it prohibits every Thing which has the least Tendency to it, what specious Pretence soever it may be covered with, and therefore it will not suffer a mere Stranger, so much as to labour a Juror to appear and act according to his Conscience.

[c] 13 H.4.16.b. Moore 806. Cro. El. 816. Co.Lit.159.b. 369. a.

Sect. 3. Also it is said, That generally the giving of Money to a Juror [d] after the Verdict, without any precedent Contract in Relation to it, is an Offence savouring of the Nature of Embracery; because if such Practices were allowable, it would be easy to evade the Law, by giving Jurors secret Intimations of such an intended Reward for their Service, which might be of as bad Consequence as the giving of Money before-hand. And it seems clear, That the giving of Jurors such a reasonable Recompence, as is usually allowed them for their Expences in travelling, *&c.* which may fairly be expected by them from either Side that shall prevail, is no way criminal, because if no such Allowance were to be expected, it would be often difficult to prevail with Persons to serve on Jury at their own Charge; and therefore by Experience it hath been found necessary to permit the Parties to give Jurors some Amends for their Charges.

[d] 39 Ass. 19. Bro. Decies, 14.

Sect. 4. It hath been adjudged, That the bare [e] Giving of Money to another to be distributed among Jurors, is an Offence of the Nature of Embracery, whether any of it be afterwards actually so distributed or not; and it is [f] clear, That it is as Criminal in a Juror, as in any other Person, to endeavour to prevail with his Companions to give a Verdict for one Party by any Practices whatsoever, except only by Arguments from the Evidence which was produced, and Exhortations from the general Obligations of Conscience to give a true Verdict. And there can be no Doubt but

[e] 22 H.6. 5.b. 28 H. 6. 7. b. 12. b. 31 H. 6. 8. b. 9. Bro. Maintenance, 6, 14.

[f] 17 Ed. 4. 5.b. 18 Ed. 4. 4.b. Bro. Maintenance, 32, 39.

but that all fraudulent Contrivances whatſoever to ſecure a Verdict, are high Offences of this Nature; as where Perſons by [a] indirect Means procure themſelves or others, to be ſworn on a *Tales* in order to ſerve one Side.

[a] 1 Saund. 301.

Sect. 5. As to the ſecond Point, *viz.* what Acts of this Kind are altogether unlawful, it ſeems clear, That neither the Party himſelf, nor his Counſel, nor Attorney, nor any Perſon whatſoever, can juſtify any indirect Practices of influencing a Jury, either by giving [b] or promiſing them Money, or [c] menacing them, or [d] inſtructing them in the Cauſe beforehand, *&c.*

[b] 13 H. 4. 16. b. 17. a. 11 H. 6. 11. a. 2 Rol. A. 116. L. 6. M. 3.
[c] 19 H. 6. 31. b. 13 H. 4. 17. a.
[d] 2 Bulſt. 25. Noy 102. Co. Li. 369. a. Moore 815. Pl. 1104.

Sect. 6. As to the third Point, *viz.* In what Circumſtances ſome Acts of this Nature may be lawful, it ſeemeth clear, That any Perſon who may juſtify any other Act of Maintenance, may ſafely labour a Juror to [e] appear and give a Verdict according to his Conſcience, but that no other Perſon can juſtify intermeddling ſo far, and that no one whatſoever can juſtify the labouring a Juror [f] not to appear.

[e] Dyer 48. Pl. 19. Co. Lit. 157. b. 369. a. Moore 813. Pl. 1101.
[f] Hob. 294. Noy 102.

Sect. 7. As to the fourth Point, *viz.* How far Offences of this Kind are reſtrained by the Common Law, there can be no Doubt but that they ſubject the Offender either to an Indictment or Action, in the ſame Manner as all other Kinds of unlawful Maintenance do by the Common Law: Alſo it ſeemeth, That if an Act of Embracery were not known before the Trial of a Cauſe, ſo that the Party to whoſe Prejudice it was intended had no Opportunity to prevent the ill Effects of it, by challenging the Juror who was practiſed upon, it will be a good Ground to move the Court to ſet aſide the Verdict.

Sect. 8. As to the fifth Point, *viz.* How far Offences of this Kind are reſtrained by Statute, it is enacted, by 5 *Ed.* 3. 10. *That if any Juror, in Aſſizes, Juries, or Inqueſts, take of the one Party or of the other, and be thereof duly attainted, that hereafter he ſhall not be put in any Aſſizes, Juries or Inqueſts, and nevertheleſs he ſhall be commanded to Priſon, and further ranſomed at the King's Will. And the Juſtices before whom ſuch Aſſizes, Juries and Inqueſts ſhall paſs, ſhall have Power to enquire and determine according to this Statute.*

Sect. 9. And it is farther enacted by 34 *Ed.* 3. 8. *That in every Plea whereof the Inqueſt or Aſſize doth paſs, if any of the Parties will ſue against any of the Jurors, that they have taken of his Adverſary or of him, for to give their Verdict, he ſhall be heard, and ſhall have his Plaint by Bill preferred before the Juſtices, before whom they did ſwear, and that the Juror be put to anſwer without any Delay; and if they plead to the Country, the Inqueſt ſhall be taken* maintenant. *And if any Man other than the Party will ſue for the King againſt the Juror, it ſhall be heard and determined as afore is ſaid. And if the Juror be attainted at the Suit of other than the Party, and maketh Fine, the Party that ſueth ſhall have Half the Fine; and that the Parties to the Plea ſhall recover their Damages by the Aſſeſſment of the Inqueſt. And that the Juror ſo attainted have the Priſon of one Year, which Impriſonment the King granteth, that it ſhall not be pardoned for any Fine; and if the Party will ſue by Writ, before other Juſtices, he ſhall have the Suit in the Form aforeſaid.*

Sect. 10. And it is farther enacted by 38 *Ed.* 3. 12. *That if any Juror in Aſſizes ſworn, and other Inqueſts to be taken between the King and Party, or Party and Party, do any Thing take by them, or other of the Party, Plaintiff, or Defendant to give their Verdict, and thereof be attainted by Proof contained in the ſaid Statute of* 34 E. 3. *be it at the Suit of the Party that will ſue for himſelf, or for the King, or any other Perſon, every of the ſaid Jurors ſhall pay ten Times as much as he hath taken. And that he that will ſue*

all have the one half, and the King the other half. And that all the Embrace-rs to bring or procure ſuch Inqueſt in the Country to take Gain or Profit ſhall punished in the ſame Manner and Form as the Jurors. And if the Juror Embraceor ſo attainted, have not whereof to make Gree in the Manner foreſaid, he ſhall have the Impriſonment of one Year: And the Intent of the ing, of Great Men, and of the Commons is, That no Juſtice nor other Miniſter all enquire of Office, upon any of the Points of this Article, but only at the uit of the Party, or of other, as afore is ſaid.

In the Conſtruction of theſe Statutes the following Points have been olden:

Sect. 11. I. That all Actions of *Decies tantum* being founded on an ffence ſuppoſed to have been committed in ſome former Action appearing on Record, it will be a good Plea in Bar, either that there is no [a] ſuch ecord at all, or that there is not any ſuch [b] Record by which it may ap-ar that the Juror was ſworn, and that it is a good [c] Exception in Abate-ent of the Writ, that there is a Variance in the firſt Record from that in e Declaration in the preſent Action; yet it is ſaid, That it is not neceſſary [d] ſhew the whole Record in certain, but only ſo much of it as conveys e Plaintiff to his Action.

[a] 5 Ed. 4. 3. a. Bro. Decies tantum, 2, 11.
[b] 37 H. 6. 31. a. Bro. Decies tantum, 13.
[c] 9 H. 6. 1. Bro. Decies tantum, 1.
[d] 34 H. 6. 4. b.

Sect. 12. II. That it is not [e] ſufficient to ſhew that the Defendants took oney in order to embrace a Jury, without ſhewing alſo that they actually ſpoſed of it accordingly.

[e] 37 H. 6. 31. a. F. N. B. 171. C.

Sect. 13. III. That the [f] Plaintiff muſt ſhew in certain how much was eived, or otherwiſe the Court will not know for what Sum to give dgment.

[f] Pl. Com. 85.

Sect. 14. IV. That the giving of Money to a Juror [g] after the Verdict not within the Statute, unleſs there were ſome precedent Contract re-ing to it.

[g] 39 Aſſ. 19. Bro. Decies tantum, 14.
[h] 21 H. 6. 31. a. 37 H. 6. 31. a. Bro. Decies tantum, 10, 13. F. N. B. 171. C. B. Co. Lit. 369. a. Dy. 95. Pl. 39. 40 Ed. 3. 3. b. 36 H. 6. 28. b. Bro. Decies tantum, 3, 4. F. N. B. 171. a.

Sect. 15. V. That it is not [h] material whether the Jurors gave any Ver-ct or not, or if they did give one, whether it were true or falſe.

Sect. 16. VI. That all the Jurors and Embraceors may be joined in one ction, notwithſtanding they ſeverally received different Sums, becauſe all s received in order to give the ſame Verdict, which could not but be the ire Act of all the Jurors. But it ſeems, That each Defendant ought to ad ſeverally, that he did not take Money in the Manner as the Plain-f hath declared.

Sect. 17. VII. That the [i] Defendants ought not to plead generally, ot guilty, but that they ought ſpecially to deny the Taking of the oney, *&c.*

[i] Finch 255. 21 H. 6. 20. Bro. Decies tantum, 1. 18 Savil. 42.

Sect. 18. VIII. [k] That the Plaintiff ſhall be paid the Moiety of the oney due to him on a Judgment in *Decies tantum* before the King, be-uſe the King's Moiety is not due as a Debt but as a Fine; and wherever King is intitled to a Fine from the Suit of a Subject, the Plaintiff ſhall t be ſatisfied.

[k] 41 E. 3. 15. a. 44 E. 3. 36. b. Bro. Decies tantum, 5, 7.

Sect. 19. IX. That the Husband [l] alone may bring a *Decies tantum* an Embracry in a former Action brought by him and his Wife, becauſe a *Decies tantum* Money only is to be recovered wherein the Wife can im no Share.

[l] 7 H. 4. 2. b. 3. a. 43 E. 3. 16. a. Bro. Decies tantum, 9. 19.

Sect. 20. X. That he who buys Land to maintain a Suit at a lower ice than it is known to be worth, is as much within the Statute, for much as the [m] Land is worth more than he gave, as if he had received it Money.

[m] 41 Ed. 3. 9. b. Bro. Decies tantum, 4. 1 Rol. Ab. 579. A.

[a] 5 E. 4. 2. b. 3. a. B. 2. Ch. 26 S. 64. Bro. Decies tantum, 15. Cro. El. 138, 583. 11 Co. 65. b. 3 Inſt. 194.

Sect. 21. XI. That this being a popular Action may be barred by the [a] King's Releaſe, being made before any Action brought, but that it cannot be barred by the Releaſe of the Party grieved; and from the ſame Ground alſo it follows, that the Party grieved needs not in ſuch Action declare of any Damages done to him by the Embracery; but if he do, it is ſaid, That he [b] ought to lay them ſeverally againſt each Defendant, or elſe that his Writ ſhall abate, unleſs he will releaſe them: But perhaps there may be good Reaſon to queſtion this Opinion, for why may not the Damages be as well recovered, as the Action jointly laid againſt all the Defendants?

[b] 44 E. 3. 36. b. Bro. Decies tantum, 7.

[c] 44 E. 3. 12. a. 47 E. 3. 4. a. Bro. Decies, 6, 8.

[d] 47 E. 3. 4. a.

Vide 6 E. 4. 11. a. b. 2 Rol. Ab. 277. B.

Sect. 22. XII. That no [c] Proceſs of Outlawry lies in this Action, but only a *Capias* or Diſtreſs infinite, upon a *Nihil* returned, and that ſuch Diſtreſs ought to be of the Lands which the Defendants had at the Time of the Writ of *Decies tantum* purchaſed, and not of thoſe which they had at the Time of the Inqueſt; and that no *Capias* [d] into a foreign County lies againſt the Jurors, becauſe it ſhall be preſumed that they are in the County wherein they were returned on the Jury; but clearly this Reaſon can no way be extended to the Embraceors: And perhaps it may be over favourable to carry it ſo far in Relation to the Jurors, eſpecially ſince the Diſtreſs infinite can only affect the Lands which they had at the Time of the *Decies tantum*, before which they may poſſibly have ſold thoſe which they had at the Return of the *Venire*; and why ſhould not the Sheriff's preſent Return that the Defendants have nothing in the County, over-ballance the Preſumption chiefly grounded on the former Return, with which the preſent is not inconſiſtent, being made at a ſubſequent Time.

CHAP. LXXXVI.

Of the Offence of buying or ſelling a pretended Title.

FOR the better underſtanding the Offence of buying or ſelling a pretended Title, I ſhall conſider:

1. How it is reſtrained by Common Law.
2. How by Statute.

Moore 751. Pl. 1031. Hob. 115. Pl. Com. 80. a. 88. a.

Sect. 1. As to the firſt Point, it ſeemeth to be a High Offence at Common Law to buy or ſell any doubtful Title to Lands known to be diſputed, to the Intent that the Buyer may carry on the Suit, which the Seller doth not think it worth his while to do, and on that Conſideration ſells his Pretenſions at an Under-Rate; and it ſeemeth not to be material, whether the Title ſo ſold be a good or bad one, or whether the Seller were in Poſſeſſion or not, unleſs his Poſſeſſion were lawful and uncontеſted; for all Practices of this Kind are by all Means to be diſcountenanced, as manifeſtly tending to Oppreſſion, by giving Opportunities to Great Men to purchaſe the diſputed Titles of others,

the great Grievance of the adverse Parties, who may often be unable or discouraged to defend their Titles against such powerful Persons, which perhaps they might safely enough maintain against their proper Adversary.

Sect. 2. As to the second Point, *viz.* How far Offences of this Kind are restrained by Statute, it is recited by 1 *R.* 2. 9. *That many Persons having true Title to Lands, and also in Personal Actions were wrongfully delayed of their Rights and Actions, by Means that the Defendants did commonly make Gifts and Feoffments of their Lands in Debate, and of their Goods, to Lords, and other Great Men, against whom the said Pursuants for Menace that was made to them, neither could nor durst make their Pursuits: And also that many Persons often times used to disseise others, and anon after such Disseisin to make divers Feoffments, sometimes to Lords and other Great Men, to have Maintenance, and sometimes to Persons unknown, to the Intent to delay the said Disseisees,* &c. And it is thereupon enacted, *That from thenceforth no Gift, or Feoffment, of Lands, Tenements or Goods, be made, by such Fraud or Maintenance; and that if any be in such wise made, they shall be holden for none and of no Value; and that the said Disseisees shall from henceforth have their Recovery against the first Disseisor, as well of the Lands and Tenements, as of their double Damages, without having Regard to such Alienations, so that the Disseisees commence their Suits within the Year next after the Disseisin done.*

In the Construction of the Statute it hath been holden:

Sect. 3. That Feoffments of this Kind are only void in Respect of the Disseisees, but that they are effectual between the Feoffor and Feoffee, *&c.* Bro. Feoffments de terres, 1, 19. Co. Lit. 369. a.

Sect. 4. And it is farther enacted by 32 *H.* 8. 9. *That no Person or Persons whatsoever shall bargain, buy, or sell, or by any Ways or Means, obtain, get, or have any pretended Rights or Titles, or take, promise, grant, or covenant to have any Right or Title, of any Person or Persons, in, or to any Manors, Lands, Tenements, or Hereditaments, but if such Person or Persons, which shall so bargain, sell, give, grant, covenant, or promise the same, their Ancestors, or they by whom he or they claim the same, have been in Possession of the same, or of the Reversion or Remainder thereof, or taken the Rents or Profits thereof, by the Space of one whole Year next before the said Bargain, Covenant, Grant, or Promise made, upon Pain that he that shall make any such Bargain, Sale, Promise, Covenant, or Grant, to forfeit the whole Value of the Lands, Tenements or Hereditaments so bargained, sold, promised, covenanted, or granted, contrary to the Form of this Act. And the Buyer or Taker thereof, knowing the same, to forfeit also the Value of the said Lands, Tenements, or Hereditaments so by him bought, or taken as is aforesaid. The one Half of the said Forfeitures to be to the King, and the other Half to the Party that will sue for the same in any of the King's Courts of Record, by Action of Debt, Bill, Plaint, or Information. In which Action, Bill, Plaint, or Information, no Essoin, Protection, Wager of Law, nor Injunction shall be allowed.*

Sect. 5. But it is provided by the said Statute, *That it shall be lawful to every Person, being in lawful Possession, by taking of the yearly Farm, Rents, or Profits, of, or for any Manors, Lands, Tenements, or Hereditaments, to buy, obtain, get, or have by any reasonable Way or Means, the pretensed Right or Title of any other Person or Persons, hereafter to be made to, of, or in such Manors, Lands, Tenements, or Hereditaments, whereof he or they shall so be in*

in lawful Poſſeſſion, any Thing in the ſaid Act contained to the contrary notwithſtanding.

Sect. 6. And it is farther provided, *That the ſaid Statute ſhall not extend to charge any Perſon with any of the above mentioned Penalties, except ſuch Perſon be ſued for the Offence within one Year.*

In the Conſtruction of this Statute the following Opinions have been holden:

Sect. 7. I. That it is not material whether any Suit be depending concerning the Lands contracted for, or not, whereas the Statutes ſet forth in the precedent Chapters extended only to Contracts concerning Lands which were actually in Suit.

Pl.Com.83.b.

Sect. 8. II. That in an Action on this Statute, the Plaintiff needs not recite it, becauſe the Judges are bound *ex Officio* to take Notice of it, being of a publick Nature; but that if he do recite it, he muſt, at his Peril, take Care to recite it certainly, becauſe it is the Ground of his Action; and the Court will not aid him by intending that there is another Statute to maintain his Action, different from that whereon he himſelf hath founded it.

Lit. Rep. 369. B. 2. Ch. 25. S. 101. Pl. Com. 84. Cro. Ca. 233. Dy. 74. Pl. 19, 20. Contr. 1 And. 76.

Sect. 9. III. That in ſuch an Action againſt the Buyer of a pretended Title, it ought expreſly to appear, That the Defendant did know that the Seller had not been in Poſſeſſion the Year before; and *vicê verſâ*, that in ſuch an Action by the Buyer the contrary ought to appear, for otherwiſe it may be intended, that he was *Particeps Criminis*, and therefore ought not to have any Share of the Penalty.

1 Leon. 167. Lit. Rep. 369.

Sect. 10. IV. That it is not ſufficient to ſhew, That the Seller had not been in Poſſeſſion, *&c.* a Year before, without expreſly averring that he had a pretended Right or Title, becauſe that is the Point of the Action.

Dy. 74. Pl. 19, 20. Pl. Com. 80, 81, 87, 88. Cro. Ca. 233.

Sect. 11. V. That it is not [a] ſufficient to ſet forth the Value of the Land at the Time of the Conveyance executed, without ſhewing the Value at the Time of the Bargain, becauſe the Forfeiture is governed by the latter.

[a] Cro.Ca. 233. [b] 4 Co. 26. a. Co.Lit.369.b. Moore 655. Pl. 898.

Sect. 12. VI. That a Contract for a [b] cuſtomary Right to a Copyhold Eſtate, or for a Leaſe for [c] Years, is as much within the Statute as a Contract for the Fee-Simple; for the Words of the Statute are, *any Right or Title*, and ſuch Contracts are as much within the Miſchief intended to be redreſſed by the Statute as any others can be: But it is [d] ſaid That a Leaſe for Years made with an Intent to try the Title in Ejectment, is not within the Meaning of the Statute, becauſe it is in a kind of Courſe of Law, [e] unleſs it be made to a powerful Man to ſway the Cauſe.

[c] Pl. Com. 80, 81, 87. Dy. 74. Pl. 19, 20, 374. Pl. 17. [d] Co. Lit. 369. a. b. Con. Moore 266. Pl. 414. Dy. 374. Pl. 17. [e] Co. Lit. 369. b.

Sect. 13. VII. That in an Action for the making ſuch a Leaſe for Years it is not neceſſary preciſely to ſet forth the Commencement and End of it, becauſe the Plaintiff is ſuppoſed to be a Stranger to it.

Pl. Com. 81, 85. Dy. 74. Pl. 19, 20.

Sect. 14. VIII. That a Leaſe for Years by one out of Poſſeſſion being made off the Land, is as much within the Statute as if it had been made upon the Land, though it be wholly void in Law; for it is a Leaſe of Reputation, and taken for ſuch among the Vulgar, and tends as much to diſquiet the Poſſeſſion as if it had been effectual in Law.

1 Leon. 166. 1 And. 76, 77.

ect. 15. IX. That no Conveyance made by one, who hath the un- Bro. Maintenance 38.
eſted Poſſeſſion, and undiſputed abſolute Propriety of Lands, is any Pl. Com. 88, 89.
within the Meaning of the Statute, becauſe it no Way favours of Co.Lit.369.a.
ntenance, and can be prejudicial to no one; from whence it follows,
a Diſſeiſor obtaining the Releaſe of the Diſſeiſee, or a Mortgagor
ming his Land, are in no Danger of the Statute in Reſpect of any
ract by them made, concerning ſuch Land after ſuch Releaſe or Re-
otion.

ect. 16. X. That one, who gains the Poſſeſſion of Lands, by Vir- Pl. Com. 88. 89.
of a Judgment at Law in Affirmance of an ancient Title, cannot Moor 655. Pl. 898.
within the Meaning of this Statute in Reſpect of any Leaſe made of
Lands; for it can never be imagined, That it was the Intent of the
te to oblige all Perſons who ſhould recover their Lands, to occupy
themſelves, which would be generally inconvenient, and often wholly
cticable; and therefore it muſt be admitted from the Neceſſity of
Caſe, That ſuch Perſons may lawfully leaſe their Lands and Houſes
per Tenants, to be manured and occupied for the uſual Rents: But
ſhall appear, That the Title to ſuch Lands is ſtill conteſted notwith-
ng ſuch Recovery, and that ſuch Leaſe was in Truth deſigned for the
tenance of the Title, I can ſee no Reaſon why it ſhould not be as
within the Statute as any Caſe whatſoever. However there ſeems to
Doubt, but that if a Diſſeiſſee enter upon a Diſſeiſor, being in Poſſeſ-
of the Land under a pretended Title, and immediately ſell it to a
ger, he is as much within the Statute as if he had been out of Poſſeſ-
t the Time of ſuch Sale; for notwithſtanding his Entry was lawful, 1 Leon. 166, 167.
e had both the abſolute Property and Poſſeſſion of the Land, yet inaſ- Co.Lit.369.a. ſeems contrary.
as the Diſſeiſor claims a Title to it, which is yet in Diſpute, ſuch
by the Diſſeiſee ſeems within the Intent of the Statute, which
abſolutely to reſtrain all Perſons from transferring their diſputed
to any Stranger whatſoever. But it is ſaid, that ſuch a Sale by a Fa- Savil 95, 96.
o his Son and Heir Apparent, is excepted out of the general Purview 1 Leon. 167.
e Statute, by common Reaſon, which by the Ties of Nature as well Mo. 656.
Intereſt, obliges ſuch a Son to maintain his Father; yet it hath been
n that ſuch a Sale to a Brother of the half Blood is within the
e. 1 Leon. 167.

ect. 17. XI. It is ſaid that the above mentioned Proviſo, That Savil 95, 96.
who is in lawful Poſſeſſion by taking the yearly Rents or Pro-
of Lands, *&c.* may lawfully buy the pretended Right of a- Co.Lit.369.b.
ther Perſon by reaſonable Means, is no more than the Law
d have implied, if it had not been expreſſed; for ſuch a Con-
cannot poſſibly be to the Wrong of any one, and tends rather
iet Suits than to promote them. And from the like Reaſon al-
is ſaid, That a Diſſeiſor may lawfully get the Releaſe of the Diſ-
though his Poſſeſſion was unlawful; and it ſeems clear, That
a Releaſe cannot come within the Meaning of the Statute, if
Diſſeiſee had the true Right, and no other had any Pretence
itle to the Land; for in ſuch Caſe it is clear, That the End of
Releaſe is not for Maintenance, but for the Settlement of all
tes: But if ſuch a Diſſeiſee had had but a conteſted Title, and
Releaſe were intended only to enable the Diſſeiſor to defend him-
with the dubious Title of his Diſſeiſee, ſurely it cannot but be
uch within the Meaning of the Statute, as any Conveyance
e wholly out of Poſſeſſion. However it ſeems clear, That thoſe

Inſtances in the ſaid Proviſo by which it is ſhewn how it ſhall appear, the Perſons who are permitted to contract for pretended Titles are in P ſeſſion, as by the receiving of Rent, *&c.* are only put for Exam and that thoſe, who are any Way whatſoever lawfully ſeized in Poſſeſ Reverſion, or Remainder, are within the Benefit of the Proviſo; but it Co.Li.369. b. clear, That they can only juſtify the Taking ſuch a Conveyance as ſtrengthen the Eſtate whereof they are ſeiſed, and that they cannot tak Covenant from a Stranger to convey the Land to them, when he have recovered it on a pretended Right, becauſe ſuch a Covenant clearly to favour as much of Maintenance, as if they had been Stra to the Land.

FINIS.

45 DEC

Notes and Additions to the First Book.

F a Man be a Lunatick, and this be proved, yet the Law preſumes the acts Page 2. N° [1]
of ſuch a Perſon to be committed in thoſe Intervals, wherein he has the Uſe of Reaſon, unleſs by Circumſtances it appears they were committed in the time of Diſtemper; and this holds in Civil Caſes as well as in Criminal. 1 *H. H. P. C.* 34.
A Man *ſurdus & mutus a Nativitate* is in Preſumption of Law an Ideot, but if ppears that he hath Underſtanding, he may be tried, and ſuffer Judgment and cution. *Hale, ibid.*

Neither does the King's Command excuſe an unlawful Act. See 1 *H. H. P. C.* 44, Page 3. N° [2]
the Authorities in the Notes there, *(b) (d)*

ut by 9 *Geo.* 2. *c.* 5. this Statute of 1 *James* 1. is repealed, and no Proſecution Page 6. N° [3]
ſoever is to be carried on againſt any Perſon for Witchcraft, Sorcery, *&c.* but ons pretending to Witchcraft, *&c.* or undertaking to tell Fortunes, or pretend- from their Skill in any occult or crafty Science, to diſcover ſtolen Goods, ſhall mpriſoned for one Year, and once in every Quarter of the ſaid Year ſtand on illory by the Space of one Hour; and ſhall be obliged to give Sureties for good Behaviour, in ſuch Sum, and for ſuch Time, as the Court, by which ſuch ment ſhall be given, ſhall judge proper.

ffenders having no Spiritual Promotion, are by 1 *El. c.* 2. *ſect.* 7 and 8. to be Page 9. N° [4]
ſoned for one Year for the firſt Offence, and for the ſecond, to be impriſoned ife.

t it is provided by the ſaid Act 5 *Geo.* 1. *c.* 4. *ſect.* 2. *That if any Mayor or other* Page 11. N° [5]
ſtrate ſhall knowingly and willingly reſort to any publick Meeting for religious Worſhip, than the Church of England, *in the peculiar Habit of, or attended with, the En- of his Office, he ſhall be diſabled to hold ſuch Office, and be adjudged incapable of any Employment whatſoever, in* England, Wales, Berwick, Jerſey *and* Guernſey.

1 *Geo.* 1. *ſtat.* 2. *c.* 55. Papiſts not taking the Oaths, or not regiſtring their Page 31. N° [6]
s, and in the manner mentioned in the Act, ſhall forfeit the Fee ſimple of Lands, *&c.* two Thirds to the King, and one Third to any Proteſtant ſuing, This is enforced by 9 *Geo.* 1. *c.* 24. *ſect.* 5. but by 10 *Geo.* 1. *c.* 4. *ſect.* 1. Wo- Reverſioners, Mortgagees, and Truſtees are excepted, and by *ſect.* 10. the Clauſe former Acts relating to the Forfeiture of Fee ſimple Lands, *&c.* is repealed, he Penalty for not taking the Oaths, or not Regiſtring, is reduced to the For- e of the full Value of one Year's Rent of all the Lands, *&c.* not regiſtred, Thirds to the King, and one Third to the Perſon who ſhall ſue for the ſame. kewiſe for the Inrollment of Deeds and Wills by Papiſts, 3 *Geo.* 1. *c.* 18. En- by 11 *Geo.* 2. *c.* 11. and amended by 11 *Geo.* 2. *c.* 17.

an Alien ſubject to a foreign State at War with ours, living here as an In- Page 35. N° [7]
nt or Trader, whether he ſettled here before the War broke out, or after, compaſs the King's Death, may be dealt with as a Traitor; therefore the ge- Words in *Co. P. C.* 5. where it is ſaid that an *Alien Enemy* cannot be guilty eaſon, muſt be taken with the Allay given in *Calvin*'s Caſe, *f.* 6. *b. That he o invade this Realm, and be taken in War.* The like may be ſaid of ſuch as t over merely as Spies by a foreign Prince in Hoſtility. 1 *H. H. P. C.* 92 to 95.

e *King's Companion* is his Wife, during the Marriage between them. A Queen Page 37. N° [8]
ed from the King *a vinculo Matrimonii*, as for Conſanguinity, *&c.* is not a within this Act, tho' the King be living. This was the Caſe of *Katharine*, the Eighth's firſt Queen; as alſo of his ſecond Wife *Anne Bullen*, who was vorced *a vinculo*, and the Divorce was confirmed by 28 *H.* 8. *c.* 7. but tho' arriage was declared null *ab initio*, yet there was a Clauſe in the ſaid Act, to all Treaſons committed againſt the Queen or her Daughter *Elizabeth*, the not being thought a ſufficient Diſcharge. 1 *H. H. P. C.* 124.

The

Page 37. N° [9] *The eldeſt Son and Heir* extends not to a collateral Heir, tho' declared Heir app rent to the Crown, unleſs there be a ſpecial Proviſion for that Purpoſe by Act Parliament, 1 *H. H. P. C.* 125. where alſo it is made a *Quære*, whether the C paſſing the Death of Prince *Richard*, after the Death of his Father *Edward* Black Prince, and during the Life of his Grandfather *Edward* the Third, wo have been Treaſon within the Statute 25 *Edw.* 3. for *Richard* was Heir, and Heirſhip could not be deveſted by any after born Child; and in Page 126, it is that tho' it may probably be Treaſon within the Intent of this Act, yet it is fi to be firſt decided by Parliament, according to the Caution uſed in the Sta 25 *Edw.* 3.

If the King have two Daughters only, and no Son, the *eldeſt Daughter* is not w in the Words, nor Intent, of the King's eldeſt Son, for a Son may be born aft but Statutes have made temporary Proviſions in this Caſe. 1 *H. H. P. C.* 126.

The Clauſe relating to the Violating *the King's eldeſt Daughter unmarried*, extend a ſecond Daughter, the eldeſt being dead. But at Common Law, this Treaſon tended to any of the Daughters. *Britton*, *c.* 22. § 71. And ſee ſeveral other C and *Quæries* relating to this Clauſe in 1 *H. H. P. C.* 128, 129.

Page 37. N° [10] Riding armed upon a private Quarrel or Deſign againſt a common Perſon not Levying War againſt the King, nor would it be high Treaſon, tho' there really a War levied between two Noblemen, or others, upon a private Quarrel tween them, but only a great Riot and Contempt. 1 *H. H. P. C.* 131, 133 to 140, 141, 152, 260.

Page 38. N° [11] In the Clauſe about levying War, the Statute ſays *en ſon Realm.* The Realm *England* comprehends the narrow Seas; and therefore if a War be levied upon t Seas, as if any Subject invade the King's Ships, this is a Levying War within his Re 1 *H. H. P. C.* 154, 325, and is within the 25 *Edw.* 3. but the bare detaining ſuch Ships, or of the King's Caſtles, ſeems not to be Levying War within this S tute 1 *H. H. P. C.* 146. but was made Treaſon by the 5 and 6 *Edw.* 6. c. (ſince repealed.) See 1 *H. H. P. C.* 294, 296.

Page 38. N° [12] *Ireland*, tho' Part of the Dominions of the Crown of *England*, yet is no of the Realm of *England*, as was ruled in Time of *Edw.* 1. Yet for Levying or other Treaſon in *Ireland*, the Offender may be tried in *England*, by 35 *H.* 8. *c.* for Treaſons done out of the Realm. 1 *H. H. P. C.* 155. See *B.* 2. *ch.* 25. *ſect.* 52.

The ſame that is ſaid of *Ireland*, may be ſaid of *Man*, *Jerſey*, *Guerniſey*, and *Alderney*, which are Parcel of the Dominions of the Crown of *England*, not within the Realm of *England*; but they have ſpecial Laws of their own, cable to Criminals, and Juriſdiction for their Trials. 1 *H. H. P. C.* 155, 15 alſo the ſame Author, *p.* 156, 157, 158. concerning *Wales*, which is certainly the Kingdom of *England*, and therefore not within the Statute 35 *H.* 8. *c.* Trial of foreign Treaſons.

Page 41. N° [13] According to Sir *Matthew Hale*, in his *Hiſt. Plac. Coron.* Words, unleſs com ted to writing, are not regularly an overt Act within the Stat. 25 *Edw.* 3. See to 118.

Page 42. N° [14] Sir *Matthew Hale's Hiſt. P. C.* 211, 212, makes it a *Quære*, whether the Co feiting of Farthings and Half-pence, made current by Proclamation, be not Tr within the 25 *Edw.* 3. but he ſeems to incline to the Negative. See alſo 2 *Inſt.*

Page 43. N° [15] But *Hale's Hiſt. P. C.* 229, differs from *Coke*, and ſays, that the Intent only merchandize or make Payment with ſuch foreign Money ſo imported, is ſuffi to make it Treaſon by this Statute.

Page 46. N° [16] Stat. 9 Geo. 2. c. 30. ſect. 1. *Any Perſon enliſting himſelf, or hiring, or retai any Perſon, being a Subject of his Majeſty, with an Intent to cauſe ſuch Perſon liſt, or procure any ſuch Perſon to go beyond Sea, in order to ſerve any foreign Pri State as a Soldier, without Leave firſt obtained under his Majeſty's Sign Manual, Offender ſhall ſuffer as a Felon, without Benefit of Clergy.*

Sect. 2. *Any Offence againſt this Act committed out of this Realm, may be alled be committed, and may be enquired of, and tried in any County in* England. *Skin.*

Page 46. N° [17] *Skin.* 109. cites the Caſe of *Pargiter*, which was tried at the Bar, where formation was exhibited againſt him, for an Offence at Common Law, for ſold an Inkhorn mixed with baſe Metal for Sterling. The Court was of Op that the ſelling ſuch Metal, tho' but for a reaſonable Price, was an Offence, an no ſuch Metal ſhould be made.

1 *H. H. P. C.* 48. it is made a *Quære*, whether a Wife can be guilty of Mif- Page 56. N° [18]
n of Treaſon committed by her Huſband.

e in *Skin.* 637, 638, *The King* and *Cowper*, *&c.* an Information at Common Page 60. N° [19]
preferred againſt the Defendants, for hiring a Ship to go over to *France*, du-
the War between *England* and that Kingdom, with an Intent to aſſiſt the
s Enemies *in Contempt. Dom. Reg. &c.* The Court held it to be a great Of-
at Common Law, bordering upon Treaſon; and the Defendants were fined ac-
gly.

Man falls from his Horſe againſt a Trunk, whereof he dies, the Horſe is for- Page 67. N° [20]
a Deodand, but not the Trunk, 3 *Edw.* 3. *Fitz. Coron.* 341. but ſee a ſtrong
rity in 1 *H. H. P. C.* 420, 421, that in this Caſe, the Horſe is not forfeited,
he throw his Rider.

e Inquiſition may alſo be before the Commiſſioners of Gaol-Delivery, *Oyer* and Page 67. N° [21]
ner, or of the Peace, if omitted by the Coroner; and hence it is, that neither
Goods, nor the Goods of Felons of themſelves, Felons and other outlawed Per-
can be claimed by Preſcription, becauſe there muſt appear a Title to them by
r of Record, before they are forfeited. 1 *H. H. P. C.* 419.

d *Hale* is of Opinion, that the laſt Caſe of this *Sect.* is only Death *per Infortu-* Page 68. N° [22]
and that the Opinion of *Dalton*, *c.* 92. is not warranted by the Authorities
es, 1 *H. H. P. C.* 413, but that if *A.* had ſtruck *B.* with a Knife, intending
him, and miſſing *B.* had ſtruck and killed himſelf, there he had been *felo de*
d.

Lord *Hale*, *Vol.* 1. *p.* 416, 417, is of Opinion, that an Inquiſition taken before Page 68. N° [23]
oroner *ſuper viſum corporis*, is traverſable. See *B.* 2. *ch.* 9. *ſect.* 52.

H. P. C. 497, 498, ſeems of the contrary Opinion, and that it is not Fe- Page 70. N° [24]
but only a great Miſpriſion in the Judges of the Common Pleas, in caſe of
l by Original, or in Juſtices of the Peace, in caſe of Indictment of Treaſon,
e Judgment and award Execution.

A. not being indicted, but only ſuſpected by *B.* reſiſts or flies upon *B.*'s offering Page 71. N° [25]
ſt him, and is killed, if no Felony was committed, or *B.* had no probable Cauſe
picion, this is at leaſt Manſlaughter in *B.* If a Felony had been committed,
be not guilty, yet *B.* having Cauſe to ſuſpect him, may juſtify Impriſoning
but *Quære*, if *B.* ſhould kill *A.* in the Purſuit, whether this will excuſe him from
ughter. 1 *H. H. P. C.* 490. See alſo 2 *H. H. P. C.* 83, 119. And in caſe
a Conſtable or Officer, ſee 2 *H. H. P. C.* 92, 93. If Felony be committed
, and another arreſt him not knowing the Truth, the Law is the ſame as if
w it, only he does it at his Peril. 2 *H. H. P. C.* 78.

Man killing one who attempts to raviſh his Wife or his Daughter, is within Page 72. N° [26]
rivilege of *ſe defendendo*, if it could not otherwiſe be prevented; but if it
he is guilty of Manſlaughter. 1 *H. H. P. C.* 485, 486.

he unlawful Act be only *malum prohibitum*, as by the Stat. 33 *H.* 8. *c.* 6. Page 74. N° [27]
ſon, not having Lands, &c. *of the Yearly Value of one hundred Pounds* per
, *may keep a Gun, upon Pain of Forfeiture of ten Pounds*; then ſuppoſing a
not qualified ſhoots at a Bird, and by Miſchance kills the By-ſtander, by
aking of the Gun or by ſome other Accident, this according to Lord *Hale*,
s only to Chance-medley. 1 *H. H. P. C.* 475, 476.

by impriſoning a Man ſo ſtrictly that he dies; and therefore where any Page 78. N° [28]
es in Gaol, the Coroner ought to be ſent for to inquire after the manner of
ath. 1 *H. H. P. C.* 432. ſee *B.* 2. *Ch.* 9. *Sect.* 21.

e does not know the Beaſt uſed to hurt People, he is not to be puniſhed; but Page 79. N° [29]
Beaſt be *feræ Naturæ*, he is bound at his Peril to keep him up ſafe. 1 *H. H.*
30, 431, 617.

Geo. 2. c. 21. *If any Perſon be feloniouſly Stricken, or Poiſoned upon the Sea,* Page 79. N° [30]
ny Place out of England, *and dies in* England, *or Stricken or Poiſoned in* Eng-
nd dies on the Sea, or out of England; *in either Caſe an Indictment found by*
of the County in which ſuch Death, Stroke or Poiſoning, happened reſpectively,
as effectual at Law, againſt Principals and Acceſſaries, and all Courts ſhall pro-
the ſame Manner, and Offenders have the ſame Trial, &c. (*Challenges for the*
d excepted) *as if the Stroke, Poiſoning and Death had happened in the County*
the Indictment is found.

Notes and Additions to the First Book.

Page 80. N° [31] Lord *Hale*, *H. P. C.* 433. is of Opinion that the Causing an Abortion by giving a Woman a Potion, or striking her, is not Murder nor Manslaughter, because the Child is not yet *in rerum natura*; nor can it be legally known, whether it were killed or not; and he says it would not be Homicide, tho' such Child were born alive and baptized, and afterwards died of the Stroke given the Mother; for this he cites 1 *Ed.* 3. 23. *b. Fitz. Coron.* 146.

He who gives a Potion to destroy the Child, if it kills the Mother, is guilty of Murder. 1 *H. H. P. C.* 429.

Page 86. N° [32] If a Bailiff enter by the outer Door happening to be open, he may break open the inner Door, and killing him in this Case would be Murder. 1 *H. H. P. C.* 459. See how far Officers are justified in breaking open Doors, and concerning when the Persons killing them are guilty of Murder. *Ibid.* and 2 *H. H. P. C.* and *B.* 2. *Ch.* 14.

Page 93. N° [33] But in 1 *H. H. P. C.* 54. it is said, this Rule by the Law of *England* is false; therefore if a Person being under Necessity for want of Victuals or Clothes steal another Man's Goods, it is Felony.

Page 93. N° [34] Stat. 4 Geo. 2. c. 32. *Every Person who shall steal, rip, cut or break with Intent to steal, any Lead, Iron Bar, Iron Gate, Iron Palisadoe, or Iron Rail fixed to a Dwelling-House or other Building, or fixed in any Garden, Court-Yard, Fence, or Inclosure belonging to any Building, shall be guilty of Felony, and transported for Seven Years; and every Person aiding or abetting in stealing, ripping,* &c. *or buying or receiving such Lead, Iron,* &c. *knowing the same to be stolen, shall be subject to the same Punishment.*

Page 93. N° [35] Stat. 2 Geo. 2. cap. 25. sect. 3. *If any Person steal or take by Robbery any Exchequer Orders or Tallies, intitling any other Person to any Annuity or Share in any Public Stock, or Joint Stock or Fund, or any Exchequer Bills, Bank Notes,* South-Sea *Bonds,* East-India *Bonds, Dividend Warrants of the Bank,* South-Sea *Company,* East-India *Company, or any Company, Bills of Exchange, Navy Bills or Debenturs, Goldsmiths Notes for the Payment of Money, or other Bonds or Warrants, Bills or Promissory Notes for the Payment of Money, being the Property of any other Person, notwithstanding any of the said Particulars are termed in Law a* Chose in Action, *it shall be deemed Felony of the same Nature, and with or without Benefit of Clergy, as if the Offender had stolen, &c. other Goods of like Value with the Money due on such Orders,* &c.

Sect. 5. *No Attainder for any Offence hereby made Felony shall work Corruption of Blood, Loss of Dower, or Disherison of Heirs.*

Sect. 6. *This Act shall continue for five Years.*

Revived and made perpetual, 9 *Geo.* 2. *cap.* 18. *sect.* 1.

Page 94. N° [36] Takers of *Hawks* Eggs are not guilty of Larceny, but are punishable by Fine and Imprisonment upon the *Stat.* 11 *H.* 7. *c.* 17. and 31 *H.* 8. *c.* 12. 1 *H. H. P. C.*

Page 96. N° [37] Stat. 7 Geo. 2. c. 21. sect. 1. *If any Person shall, with any offensive Weapon or Assault, or shall by Menaces or in a violent Manner, demand any Money, Goods or Chattels from any Person, with an Intent to rob such Person, every such Offender shall be guilty of Felony, and transported for Seven Years.*

Sect. 2. *And if such Felon shall break Gaol, or escape, or return from Transportation to* Great Britain *or* Ireland, *before the Expiration of the said Term, he shall suffer as Felon, without Benefit of Clergy.*

Page 96. N° [38] But *Quære* whether the taking the Purse or Hat, *&c.* in the Presence or the Face of the Person robbed, be necessary to make the Offence Robbery, the Case put by *Hale*, *H. P. C. p.* 533. from *Dalton*; if *B.* flying from *A.* lets falls his Hat, and the Thief take it and carry it away? If such Proof necessary, it seems very easy to elude the Law.

Page 97. N° [39] But if Words of Menace be not used till after a clandestine Taking, it is only Larceny, as in the Case of *Harman* and *Halfpenny*, in 1 *H. H. P. C.* 534, 535. *Halfpenny* going up a Bank to open a Gap, *Harman* slipt his Hand into *Halfpenny*'s Pocket and took his Purse, and upon *Halfpenny*'s seeing it in *Harman*'s Hand and demanding it again, *Harman* threatned him, if he spoke of it, and went away with the Purse. This was ruled only Stealth, and the Offender had his Clergy.

Page 98. N° [40] In 2 *H. H. P. C.* 14, 15, it is said that the Court of *King's Bench* had concurrent Jurisdiction with the Admiralty, in Cases of Felonies done upon the Narrow Seas or Coasts, tho' it were High Sea, because within the King's Realm of *England*. But that this Jurisdiction of the Common Law Courts, was

ted by a ſpecial Order of the King and Council, 35 *Ed.* 3. And that ſince 38 *Ed.* 3. it does not appear that the Courts of Common Law took Cognizance Crimes committed upon the High Seas.

tat. 8 Geo. 1. c. 24. ſect. 1. *If any Commander of a Ship or other Perſon ſhall* Page 101. N° [41]
wiſe *trade with any Pirate, or ſhall furniſh any Pirate with Ammunition or Stores,*
t out *any Ship with ſuch Deſign, or confederate or correſpond with any Pirate,*
ing *him to be ſuch; every ſuch Offender ſhall be adjudged guilty of Piracy, and ſhall*
ried *according to the Statute of* 28 H. 8. c. 15. *and the* 11 & 12 W. 3. c. 7.
e perpetual by the 6 Geo. 1. c. 19. *and being convicted ſhall ſuffer as a Pirate.*
Perſons belonging to any Ship, who ſhall upon meeting any Merchant Ship upon the
Seas, forcibly board ſuch Ship, and tho' they do not carry off ſuch Ship, ſhall throw
board or deſtroy any Part of her Goods, ſhall be puniſhed as Pirates.
ct. 2. *Every Ship fitted out with Deſign to trade with or ſupply any Pirate, and*
e Goods put on board ſuch Ship, ſhall be ipſo facto *forfeited, one Moiety to the*
and the other to the Informer, to be recovered in the High Court of Admiralty.
ct. 3. *All Perſons declared Acceſſaries by the* 11 & 12 W. 3. *are hereby declared*
pal Offenders.
ct. 4. *Offenders convicted on this Act ſhall be excluded from the Benefit of Clergy.*
his Act is made perpetual by 2 *Geo.* 2. *c.* 28. *ſect.* 7.

e Word *Noctanter* is to be applied to all that follows, *viz. fregit & intravit*, ſo Page 102. N° [42]
if the Breaking were in the Day-time, and the Entry by Night, or *vice verſa*,
will not be Burglary. But if the Breaking be one Night, with an Intent to en-
d commit Felony another Night, which is done accordingly, this ſeems to
rglary according to 1 *H. H. P. C.* 551.

Matthew Hale, H. P. C. 552. ſays that in an Arraignment for Burglary be- Page 102. N° [43]
im, he was doubtful whether Creeping down a Chimney were Burglary, till it
ed that ſome Bricks had been thereby looſened and thrown down into the

if he ſhoot without the Houſe and the Bullet comes in, this ſeems to be no Page 103. N° [44]
to make Burglary. *Quære* 1 *H. H. P. C.* 555.
1 *H. H. P. C.* 553. it is ſaid to be Burglary in both. Page 103. N° [45]
if one break open a Study or Counting-Houſe, or Shop within the Houſe, Page 104. N° [46]
Burglary, tho' none uſually lodge in the Study; and the ſame Law ſeems to
one break open a Cupboard or Counter fixed to the Houſe, *Quære* 1 *H. H.*
555. but not a Cheſt, becauſe it is no Part of the Houſe, *ibid.* 554. but it is
without Benefit of Clergy by Statutes. See *B.* 2. *Ch.* 33. of Clergy, *ſect.* 64.
Woman being a Man's Concubine is no Exception at this Day. 1 *H. H. P. C.* Page 108. N° [47]
And the Opinion of Mr. *Finch*, cited by *Dalton*, and by *Stamford* from *Britton*,
can be no Rape if the Woman conceive, ſeems to be no Law. 1 *H. H. P. C.*

Divorce intended is certainly not *a vinculo Matrimonii*, for then without Page 111. N° [48]
d of a *Proviſo* either Party might freely marry; but it muſt be intended of
orce *a Menſa & Thoro*. The Doubt in *Cro. Car.* 461. is whether a Divorce
evitiæ was within this Exception, becauſe it ſeemed rather to be a proviſional
ion for the Wife's Safety and Maintenance, than a Divorce; but it was never
d. 1 *H. H. P. C.* 694.
taken before a Judge is not Bail within this Statute till it be filed of Page 114. N° [49]
; and if it be not filed, the acknowledging thereof in another's Name, makes
ony, but a Miſdemeanor only. 1 *H. H. P. C.* 696.
the Act which has been Annually paſt of late Years, intitled, *An Act for* Page 117. N° [50]
g Mutining and Deſertion, and for the better Payment of the Army and their
s. By which Soldiers for the Offences of Mutiny or Deſertion, *&c.* are ſub-
to Military Law, and the Judgment of a Court Martial. And by which
g is impowered to make Articles of War.
by 12 *Annæ, ſtat.* 2. *c.* 18. *ſect.* 6. made Perpetual by 4 *Geo.* 1. *c.* 12. it is en- Page 118. N° [51]
That if any Perſon ſhall make, or be aſſiſting in making any Hole in a Ship, or
eal any Pump belonging to any Ship in Diſtreſs, or ſhall be aiding or abetting to
aling, or ſhall wilfully do any Thing tending to the immediate Loſs or Deſtruction
Ship, ſuch Perſon ſhall be guilty of Felony without Benefit of Clergy.
11 Geo. 1. c. 29. ſect. 6. *If any Owner of, Captain, Maſter, Officer or Mariner,* Page 118. N° [52]
g to any Ship, ſhall wilfully caſt away, burn, or otherwiſe Deſtroy the Ship of which

he

he is Owner, or to which he belongs, or procure the ſame to be done, with Intent to prej dice any Perſon that hath or ſhall underwrite any Policy of Inſurance thereon, or Merchant that ſhall load Goods thereon, or any Owner of ſuch Ship, the Perſon offending ſhall ſuffer as a Felon without Benefit of Clergy.

Page 119. N° [53] By 4 Geo. 1. c. 11. ſect. 6. *Perſons impriſoned for exporting Wool*, &c. refu *to plead, Judgment ſhall be entered againſt them by Default, and if they pay not Sum recovered againſt them, within three Months after Judgment, they ſhall tranſported as Felons ; and if they return to* Great Britain *or* Ireland *before the E piration of Seven Years, they ſhall ſuffer as Felons without Benefit of Clergy.*

Page 122. N° [54] This Act of the 13 & 14 *Car.* 2. *c.* 22. is continued by the 6 *Geo.* 2. *c. ſect.* 7. to the Firſt of *September* 1744, *&c.* and the Clauſe in the 18 *Car.* 2. *ſect.* 2. taking away the Benefit of Clergy from great and notorious Thieves Spoil-Takers in the Counties of *Northumberland* and *Cumberland*, as alſo the C in the 29 & 30 *Car.* 2. *c.* 2. *ſect.* 2 and 3. empowering the Juſtices of Peace for ſaid Counties reſpectively, to take Security from the Perſons by them emplo for the Preſervation of the ſaid Counties from Theft and Rapine, *&c.* are like revived and continued to the ſaid Firſt of *September* 1744.

Page 123. N° [55] By the 5 *Geo.* 2. *c.* 30. *ſect.* 1. continued by the 9 *Geo.* 2. *c.* 18. until the 29 *September* 1743, and from thence to the End of the next Seſſions of Parlia the Time limited for Bankrupts to ſurrender themſelves is forty-two Days, w by *ſect.* 3. of the ſaid Stat. may be enlarged by the Chancellor, Lord Keeper, to any Time not exceeding fifty Days, to be computed from the End of the forty-two Days ; ſo as ſuch Order for enlarging the Time be made at leaſt Days before the Time ſuch Bankrupts were to ſurrender themſelves. And the B rupt not ſurrendering himſelf, and refuſing to make Diſcovery, or imbeziling is to be adjudged a Felon without Benefit of Clergy.

Page 124. N° [56] Theſe Clauſes making it Felony without Benefit of Clergy, to forge Exch Bills, Stamps, Lottery Tickets or Orders, as alſo Annuity Orders, are unſkil peated or referred to in all Acts of Parliament directing the Iſſuing Exchequer- *&c.* See the 9 *Geo.* 1. *c.* 12. *ſect.* 4. relating to Annuity Orders made in purſu of that Act, and the Acts therein mentioned.

Page 124. N° [57] Stat. 6 Geo. 1. c. 11. ſect. 50. *If any Perſon ſhall forge, counterfeit* or alter *Receipt, (of the* South-Sea *Company) Warrant, or Endorſement or Writing thereu therein, or ſhall tender ſuch forged*, &c. *Receipt*, &c. *knowing the ſame to be forged, ſaid Company, or to any of their Officers, or ſhall offer to diſpoſe of the ſame, k the ſame to be forged, and with Intent to defraud the ſaid Company, or any other ſon ; ſuch Offender ſhall be adjudged a Felon without Benefit of Clergy.*

Page 124. N° [58] Stat. 6 Geo. 1. c. 18. ſect. 13. *If any Perſon ſhall forge or counterfeit the C Seal of either of the Corporations for Aſſurance, or ſhall forge, counterfeit* or alter *Policy, Bill, Bond or Obligation, under the Common Seal of either the ſame C tions, or ſhall offer to diſpoſe of or pay away any ſuch forged Policy, Bill*, &c *ing the ſame to be ſuch, or ſhall demand the Money therein contained, or pretended t thereon, or any Part thereof, from ſuch Corporation or their Officers, with I defraud*, &c. *every ſuch Offender ſhall be guilty of Felony, without Benefit of Cler*

Page 124. N° [59] Stat. 8 Geo. 1. c. 22. ſect. 1. *If any Perſon ſhall forge or counterfeit, or pr be forged, or knowingly and wilfully act or aſſiſt in the Forging any Letter of A or other Authority to transfer, aſſign*, &c. *any Share, or Part of ſuch Share, in the capital Stocks of Bodies corporate eſtabliſhed by Act of Parliament, or t Annuities or Dividends, or ſhall forge the Name of any Proprietor, or of any Per titled to any Annuity or Dividend, or to any ſuch pretended Letter of Attorney, fraudulently demand any Share in Stock transferred, or ſuch Annuity, Dividend thereof, to be received by Virtue of ſuch forged Letter of Attorney, or ſhall falſely nate any Proprietor of the ſaid Shares, Annuities and Dividends, and thereby or endeavour to transfer the Stock, or receive the Money of ſuch Proprietor, ſuch Offender ſhall be adjudged guilty of Felony, without Benefit of Clergy.*

Page 124. N° [60] Stat. 12 Geo. 1. c. 32. ſect. 9. *If any Perſon ſhall forge, or procure to be for aſſiſt in forging the Name or Hand of the Accountant General of the Court of Ch the Regiſter, the Clerk of the Report-Office, or any of the Caſhiers of the Bank o* land, *to any Certificate, Report*, &c. *in Order to the Receiving any of the M Effects of the Suitors of the Court of* Chancery, *or ſhall forge any Certificate, &c. made by ſuch Accountant General, or any Bond under the Seal of the* East-Ind

or any Indorſement or Aſſignment thereon, or on any Bond under the Seal of the Sea Company, or ſhall utter or publiſh any ſuch, knowing the ſame to be forged, an Intent to defraud, &c. every ſuch Offender ſhall be guilty of Felony without of Clergy.

. 1 Geo. 1. ſtat. 2. c. 48. *If any Perſon ſhall maliciouſly ſet on Fire, or burn any Underwood, or Copice, or any Part thereof, ſuch Perſon ſhall ſuffer as a Felon.* Page 124. N° [61]

. 4 Geo. 1. c. 11. ſect. 4. *Where any Perſon taketh Money or Reward, under pre- f helping any Perſon to ſtolen Goods, he ſhall (unleſs he apprehends the Felon, and him to be brought to Trial, and gives Evidence againſt him) be guilty of Felony, and the Penalties according to the Nature of the Felony committed in ſtealing ſuch as if he had ſtolen them himſelf.* Page 124. N° [62]

other Matters in this Statute, as alſo in 6 *Geo.* 1. *c.* 23. relating to the portation of Felons, ſee *B.* 2. *Ch.* 33. *ſect.* 135, 136, *&c.*

. 6 Geo. 1. c. 21. ſect. 34. *If Officers of the Cuſtoms be forcibly hindred, beaten unded in the due Execution of their Office, by Perſons tumultuouſly aſſembled, and with Clubs or other Weapons, to the Number of Eight or more, all Perſons ſo ng, beating,* &c. *with their Aſſiſtants, being convicted thereof, ſhall be tranſported Term not exceeding Seven Years, according to the Manner ſet forth in* 4 Geo. 1. *and Offenders returning to* Great Britain *or* Ireland *before the Expiration of their ſhall ſuffer as Felons without Benefit of Clergy.* Page 124. N° [63]

. 6 Geo. 1. c. 23. ſect. 11. *If any Perſon ſhall wilfully and maliciouſly aſſault rſon in the publick Streets or Highways, with Intent to tear, ſpoil, cut, burn ce, and ſhall tear, ſpoil,* &c. *the Cloaths of ſuch Perſons, ſuch Offender ſhall be f Felony; and the Court, before whom he ſhall be tried, ſhall have Power to tranſ- n for Seven Years.* Page 124. N° [64]

. 8 Geo. 1. c. 18. ſect. 6. *All Perſons who ſhall be found paſſing (knowingly and ly) with any foreign Goods landed from any Ship, without due Entry and Payment es, in their Cuſtody, from any of the Coaſts of this Kingdom, or within the Space of Miles of any of the ſaid Coaſts, and ſhall be more than five Perſons in Com- r ſhall carry any offenſive Arms, or wear any Mask or other Diſguiſe, when paſ- ith ſuch Goods, or ſhall forcibly hinder or reſiſt any of the Officers of the Cuſtoms iſe, in the Seizing any Sort of ra Goods, ſhall be deemed and taken to be Runners gn Goods within the Meaning of this Act; and being convicted ſhall be adjudged and tranſported for Seven Years; and ſuch Offenders, returning to* Great Britain nd *before the Expiration of the ſaid Term, ſhall be guilty of Felony without Be- Clergy.* Page 124. N° [65]

Act by 2 *Geo.* 2. *c.* 28. *ſect.* 6. is continued to the 29th of *September* 1744,

. 9 Geo. 1. cap. 22. ſect. 1. *If any Perſons being armed with Swords, Fire Arms offenſive Weapons, and having their Faces blacked, or being otherwiſe diſguiſed, pear in any Foreſt, Chaſe, Paddock or Grounds incloſed, wherein Deer are uſual- or in any Warren or Place where Hares or Conies are uſually kept, or in any y, Heath, Common or Down; or ſhall unlawfully and wilfully hunt, wound, ſteal, any red or fallow Deer, or rob any Warren or Place where Conies or are uſually kept; or ſteal or take Fiſh out of any River or Pond; or if any ſhall unlawfully and wilfully hunt,* &c. *any red or fallow Deer, kept in any Majeſty's Foreſts or Chaſes incloſed with Fences, or in any Park,* &c. *incloſed, Deer are uſually kept, or ſhall unlawfully and maliciouſly break down the Head Fiſh-pond, whereby the Fiſh ſhall be loſt; or ſhall unlawfully and maliciouſly kill, r wound, any Cattle, or cut down or deſtroy any Trees planted in any Avenue ing in any Orchard, Garden or Plantation, for Ornament, Shelter or Profit; or fire to any Houſe, Barn or Out-houſe, or to any Hovel, Cock, Mow or Stack of Straw, Hay or Wood; or ſhall wilfully and maliciouſly ſhoot at any Perſon in any g-houſe or other Place; or ſhall knowingly ſend any Letter without a Name d thereto, or ſigned with a fictitious Name, demanding Money, Veniſon, or other valu- ing; or ſhall forcibly reſcue any Perſon, being lawfully in Cuſtody of an Officer or erſon, for any of the ſaid Offences; or if any Perſon ſhall by Gift or Promiſe ard, procure any other to join him in any ſuch unlawful Act, every Perſon ſo g, being convicted, ſhall be guilty of Felony, and ſhall ſuffer Death without Be- Clergy.* Page 124. N° [66]

Sect. 4. *If any Person shall be charged with any of the said Offences before Justices of the County where the same were committed, by Information of one credible Person on Oath by him subscribed, such Justices shall certify such Information to one of the Principal Secretaries of State, who is to lay the same before his Majesty in Council, whereupon his Majesty may make his Order in Council, commanding such Offender to surrender himself within forty Days to the Justices of the King's Bench, or to a Justice of Peace, to answer the Offences wherewith he shall stand charged; which Order shall be printed in the next* London Gazette, *and transmitted to the Sheriff of the County where the Offence shall be committed, and shall within six Days after the Receipt thereof be proclaimed by him or his Officers, between Ten in the Morning and Two in the Afternoon, in the Market-Places on the Market-Days of two Market-Towns in the County, near the Place where such Offence was committed; and a Copy of the Order shall be affixed in some publick Place in such Market-Towns; and if such Offender do not surrender pursuant to such Order, he shall be deemed convicted and attainted of Felony, and shall suffer Death without Benefit of Clergy; and the Court of King's Bench or the Justices of* Oyer *and* Terminer *or Gaol-Delivery for the County where the Offence is sworn in such Information to have been committed, upon producing such Order in Council under the Seal of the Council, may award Execution against such Offender as if he had been convicted in the said Court,* &c.

Sect. 5. *Every Person, who, after the Time appointed for the Surrender of any Person so charged, shall conceal, abet or succour him, knowing him to be so charged and required to surrender, being convicted thereof, shall suffer Death as a Felon without Benefit of Clergy. Continued by* 10 Geo. 2. c. 32. *till the first of* September, 1744.

Page 124. N° [67] Stat. 9 Geo. 1. c. 28. sect. 1. *If any Person shall, within the Place commonly called the Mint, or the pretended Limits thereof, wilfully obstruct the serving or execution of any Writ, Warrant or legal Process whatsoever, or shall assault or abuse any Person serving such Writ,* &c. *whereby such Person shall receive bodily Hurt;*

Sect. 2. *Or shall oppose any Officer of Justice or any Person aiding such Officer in the Execution of any Writ,* &c. *or shall make Rescous of any Prisoner taken upon such Writ,* &c. *or shall knowingly conceal any Prisoner so taken, or any Person who rescued such Prisoner, or shall be any ways aiding in resisting such Officer, or in rescuing such Prisoner, or shall exercise any unlawful Jurisdiction, or execute or join in executing any pretended Rule for supporting any pretended Privilege within the said Place or the Limits thereof, or for opposing the due Execution of legal Process; such Offender shall be guilty of Felony, and transported as other Felons.*

Sect. 3. *And if any Person wearing any Vizard, Mask, or being otherwise disguised shall within the said Mint, or pretended Limits thereof, join in, aid or abet any Riot or Tumult there, or shall in any such Disguise oppose the Execution of any legal Process, or assault and abuse any Person serving such Process; such Offender shall be guilty of Felony without Benefit of Clergy. And all Persons aiding, abetting or concealing such disguised Person, shall be guilty of Felony and transported.*

Sect. 14. *If any Person so residing, or pretending to reside in the said Mint, shall injure himself in any of the Matters in this Act mentioned, he shall be guilty of Felony without Benefit of Clergy.*

Page 124. N° [68] Stat. 12 Geo. 1. c. 34. sect. 6. *If any Person shall assault or abuse any Master Woolcomber or Master Weaver, or other Person concerned in the Woollen Manufacture, or such Master,* &c. *shall receive any bodily Hurt, for not complying with the illegal By-Laws, Ordinances,* &c. *in the Statute mentioned; or if any Person shall knowingly send any Writing or Message, threatning Harm to such Master Woolcomber,* &c. *or to destroy any of their Houses, Trees or Cattle, for not complying with the Demands or Prices of their Workmen, or for not complying with such illegal By-Laws; every such Offender shall be guilty of Felony and transported.*

Sect. 7. *If any Person shall break into any House or Shop, with Intent to destroy any Serge, or other Woollen Goods, in the Loom, or any Tools employed in the Making thereof, or shall wilfully and maliciously destroy any such Serges,* &c. *in the Loom or on the Rack, or destroy any Rack, on which such Serges,* &c. *are dried; or shall destroy any Tools used in the Making such Serges,* &c. *without the Consent of the Owner, such Offender shall be guilty of Felony without Benefit of Clergy.*

Sect. 8. *The like Penalties to be extended to Combers of Kersey and Wool, to Stocking-knitters and Weavers, and to Makers of Stockings.*

tat. 12 Geo. 1. c. 36. ſect. 3. *Perſons wilfully and maliciouſly burning, blowing up,* Page 124. N° [69]
ng down, *or deſtroying the Bridge from* Fulham *to* Putney, *or any Part thereof, or*
ipting *ſo to do, or without Authority taking away any Works thereto belonging, or*
uring *the ſame to be done, whereby the ſaid Works may be damaged; ſuch Offenders*
be adjudged *Felons without Benefit of Clergy.*

tat. 1 Geo. 2. Seſſ. 2. c. 19. ſect. 1. *If any Perſon ſhall break down any Turnpike,* Page 124. N° [70]
be *ſhall be ſent to Gaol or to the Houſe of Correction for three Months, and be whipt*
ckly
ect. 2. *And convicted of a ſecond Offence ſhall be adjudged a Felon and tranſported*
ven *Years.*
his Act is continued by 5 *Geo.* 2. *c.* 33. for five Years, which further enacts, *That any*
n *maliciouſly deſtroying any Turnpike,* &c. *ſhall for the firſt Offence be guilty of Felony*
ranſported *for ſeven Years, and returning from Tranſportation before the Expiration*
ſaid *Term, ſhall be guilty of Felony without Benefit of Clergy.* Both theſe Acts are con-
d by 8 *Geo.* 2. *c.* 20. for five Years. See the Act in N° [74.]

t. 4 Geo. 2. c. 16. ſect. 1. *Any Perſon who ſhall felonioufly take or ſteal, or ſhall* Page 124. N° [71]
e *any other Perſon to ſteal from any Whitening or Bleaching Croft, Field,* &c. *or*
ny *Building made Uſe of by any Whitſter,* &c. *for whitening Linen, Fuſtian or*
Cloth, *or any Thread, Yarn,* &c. *to the Value of ten Shillings, or ſhall buy or re-*
any *ſuch Goods, knowing them to be ſtolen, ſhall be guilty of Felony without Benefit of*
, *unleſs the Court, before whom the Conviction ſhall be, ſhall think it reaſonable upon*
rcumſtances *of the Caſe that the Offender, inſtead of ſuffering Death, ſhould be tranſ-*
; *in which Caſe the Offender ſhall be tranſported for ſeven Years, in the Manner*
d by 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23.
t. 2. *Offenders refuſing to be tranſported, or breaking priſon, eſcaping, or returning*
the *Term expired, ſhall ſuffer Death.*

. 4 Geo. 2. c. 18. ſect. 1. *If any Perſon ſhall within* Great Britain *or* Ireland, *or* Page 124 N° [72]
ber *of his Majeſty's Dominions, or without, falſely make, forge, or counterfeit, or*
o *be falſely made,* &c. *or knowingly aſſiſt in falſe making,* &c. *any Paſs for any*
ommonly *called a* Mediterranean Paſs, *or ſhall counterfeit the Seal of the Admiralty*
or the Hand of the Lord High Admiral, or of any Commiſſioner for executing the
of *Lord High Admiral, to any ſuch Paſs; or ſhall alter or eraſe any true Paſs*
by *the Lord Admiral or Commiſſioners,* &c. *or ſhall utter and publiſh as true any*
lſe, *forged,* &c. *Paſs, knowing the ſame to be ſuch; every ſuch Offender ſhall ſuffer*
Felon *without Benefit of Clergy.*
. 2. *Such Offences committed any where out of the Realm may be tried in any*
of Great Britain.

. 6 Geo. 2. c. 37. ſect. 5. *If any Perſon ſhall maliciouſly break or cut down* Page 124. N° [73]
nk *of any River, or any Sea Bank, whereby any Lands ſhall be overflowed or*
d, *every Perſon ſo Offending ſhall be guilty of Felony without Benefit of Clergy.*
. 6. *If any Perſon ſhall maliciouſly cut any Hop-binds growing on Poles in any*
tion *of Hops; every Perſon ſo offending ſhall be guilty of Felony without Benefit of*

10 *Geo.* 2. *c.* 32. Theſe Clauſes are to be in force till the Firſt of *September*
&c.

. 8 Geo. 2. c. 20. *Any Perſon who ſhall maliciouſly deſtroy any Turnpike-Gate,* Page 124. N° [74]
Rail, *Wall, Chain or other Fence ſet up, or to be ſet up, to prevent Paſſengers from*
by *without paying Toll, directed to be paid by Act of Parliament, or any Lock,*
Floodgate, *or other Works erected on any Navigable River by Authority of Parlia-*
or ſhall forcibly reſcue any Perſon lawfully in Cuſtody for ſuch Offence; ſuch Offender
guilty *of Felony without Benefit of Clergy.*
inder on this Act not to work Corruption of Blood, Loſs of Dower or For-

Statute together with the 1 *Geo.* 2. *ſtat.* 2. *c.* 19. and 5 *Geo.* 2. *c.* 33. are to
e for five Years, from the 15th of *May* 1735, and from thence to the End of
n next Seſſion of Parliament.

. 9 Geo. 2. c. 29. ſect. 5. *Any Perſon wilfully and maliciouſly deſtroying the Bridge* Page 124. N° [75]
ilt *from* Weſtminſter *to the oppoſite Shore, or any Part thereof, or attempting ſo to*
without Authority from the Commiſſioners, removing or taking away any Works
belonging, *whereby the ſaid Bridge may be damaged, or in any wiſe directing or*
g *the ſame to be done, ſhall ſuffer as a Felon without Benefit of Clergy.*

Stat.

Page 124. N° [76] Stat. 9 Geo. 2. c. 35. ſect. 1. *All Perſons having incurred any Penalty by the Cl... deſtine running of Goods, &c. before the 27th of* April 1736, *or for reſiſting, beat... &c. any Officer in the due Execution of his Duty, ſhall be indemnified, &c.*

Sect. 7. *Provided that if any Perſon, who hath been guilty of any Offence before menti... ed, for which he is liable to be tranſported as a Felon, ſhall take the Benefit of this A... and ſhall afterwards be guilty of the like Offence, then every ſuch Perſon being convicted... the ſaid Offence hereafter to be committed, and upon Proof made that ſuch Perſon had o... mitted any of the ſame Offences before the making of this Act, and had taken the Be... thereof for his Diſcharge, ſhall be guilty of Felony without Benefit of Clergy.*

Sect. 10. *All Perſons (to the Number of Three or more, armed with Fire Arms or o... offenſive Arms) upon Conviction of their being aſſembled and armed, in order to be aſſi... in the Clandeſtine running of prohibited or uncuſtomed Goods, ſhall be adjudged guilty... Felony, and tranſported for ſeven Years; and if ſuch Offenders return into* Great Britain... Ireland *before the Expiration of the ſaid Term, they ſhall ſuffer as Felons without Be... of Clergy.*

Sect. 13. *All Perſons who, to the Number of Two or more in Company, ſhall be f... paſſing within five Miles from the Sea Coaſt, or from any Navigable River, with any H... Cart, or Carriage, whereon there ſhall be laden more than ſix Pounds of Tea, or Bra... other Spirits exceeding the Quantity of five Gallons, not having paid the Duties by L... charged thereon, and not having a Permit for the ſame, or any other foreign Goods to... Value of Thirty Pounds Sterling, landed from any Ship, without due Entry and Pay... of Duties, and ſhall carry any offenſive Arms, or wear any Mask or Diſguiſe, when p... with ſuch Goods; or ſhall forcibly aſſault or reſiſt any of the Officers of the Cuſtom... Exciſe in the Seiſing any run Goods, or other Execution of their Office, ſhall be d... Runners of foreign Goods within the Intent and Meaning of the* 8 Geo. 1. c. 18. *and e... ſuch Offender ſhall be guilty of Felony, and tranſported for ſeven Years; and ſuch Offe... returning to* Great Britain *or* Ireland, *before the Expiration of the ſaid Term, ſhall b... as a Felon without Benefit of Clergy.*

Sect. 28. *If any Officer of the Cuſtoms or Exciſe being on board any Ship, Boat, ... Veſſel, within the Limits of any of the Ports of this Kingdom, be forcibly hindred, wou... ed or beaten, in the due Execution of his Office, by any Perſon whatſoever, all Perſons ... forcibly hindering, &c. and all ſuch as ſhall act in their Aſſiſtance, ſhall be tranſported ... a Term not exceeding ſeven Years; and if ſuch Offenders ſhall return before the Ex... tion of their ſaid Term, they ſhall ſuffer as Felons without Benefit of Clergy.*

Page 124. N° [77] Stat. 10 Geo. 2. c. 31. ſect. 8. *If any greater Number of Perſons ſhall be take... to or carried in any Tilt-Boat, Row-Barge, Ferry-Boat, or other Boat or Wherry, ... are reſpectively allowed to be carried by this Act, and any Paſſenger ſhall then be dro... every Perſon who ſhall work or navigate ſuch Tilt-Boat, Row-Barge, &c. offe... therein, and being thereof convicted, ſhall be guilty of Felony, and tranſported ... Felon.*

Page 124. N° [78] Stat. 10 Geo. 2. c. 32. ſect. 4. *All the Proviſions made in the* 9 Geo. 1. c. 2... *bringing Offenders againſt the ſaid Act to Juſtice, and the Perſons who ſhall ... abet or ſuccour ſuch Offenders, &c. ſhall, during the Continuance of the ſaid Act... tend to all Offences by unlawfully or maliciouſly breaking or cutting down the Ba... any River or Sea-Bank, or by unlawfully and maliciouſly cutting Hop-Binds, or by ... fully and maliciouſly ſetting on fire any Delph of Coal.*

Sect. 6. *If any Perſon ſhall maliciouſly ſet on fire, or cauſe to be ſet on fire, any ... Pit, or Delph of Coal or cannel Coal, every Perſon ſo offending ſhall be guilty of ... without Benefit of Clergy.*

Sect. 7. *If any Perſon hereafter convicted of courſing, hunting, taking in Toils... ling, wounding or taking away, any red or fallow Deer, in any open or unincloſed ... or Chaſe where Deer are uſually kept, (for which by the* 3 & 4 W. & M. ... *he is only liable to pecuniary Penalties, and not puniſhable by* 9 Geo. 1. c. 22.) ... *during the Continuance of the* 9 Geo. 1. c. 22. *be guilty of a ſecond Offence of ... Nature, ſuch Offender ſhall be tranſported for ſeven Years; and ſuch Offender re... to* Great Britain *or* Ireland *within the ſaid ſeven Years ſhall be guilty of Felony ... Benefit of Clergy.*

Sect. 9. *If any Perſons armed with Fire Arms or other offenſive Weapons ſhall, ... the Continuance of the ſaid* 9 Geo. 1. c. 22. *come into any Foreſt, Chaſe or ... wherein Deer are uſually kept (be the ſame incloſed or not incloſed) with an Intent ... take in Toils, &c. any Deer, and ſhall there beat, or wound, any Keeper, &c. in t...*

of his Office; every such Offender shall be transported for seven Years, and such Of-
returning within the said Term, shall suffer as a Felon without Benefit of Clergy.
t. 11 Geo. 2. c. 22. sect. 1. If any Person shall wilfully and maliciously beat, Page 124. N° [79]
d, or use any Violence to any Person, with Intent to hinder him from buying of any
or Grain; or shall stop or seise any Waggon or other Carriage, or Horse loaded with
t, Flower, Meal, Malt or other Grain, on the Way from any City, Market-Town or
ort, and maliciously break or destroy the same or Part thereof, or the Harness of the
s drawing the same, or shall take of, kill or wound any of such Horses, or beat or
the Drivers of such Waggon, &c. so loaded, in order to stop the same; or shall scatter
Wheat, &c. or shall take or damage the same or any Part thereof; every such Offender
e sent to Gaol or the House of Correction for any Time not exceeding three Months,
s than one Month, and shall be once publickly whipt.
t. 2. And if any Person so convicted shall commit any of the said Offences a second
or if any Person shall maliciously throw down or destroy any Storehouse or Granary,
er Place, where Corn shall be kept in Order to be exported; or shall enter any such
ouse, &c. and carry away any Corn, &c. or shall throw abroad or spoil the same;
ll enter any Ship, or Vessel, and carry away, throw out or spoil any Grain intended
portation; every such Offender shall be guilty of Felony and transported for seven Years,
ch Offender returning before the Expiration of the seven Years shall suffer as a Felon
t Benefit of Clergy.
t. 11 Geo. 2. c. 26. sect. 2. If any Persons to the Number of five or more, shall in Page 124. N° [80]
ltuous and riotous Manner assemble themselves to rescue any Offender against the
. 2. for laying a Duty on Retailers of Spirituous Liquors, &c. or to assault,
or wound any Person who shall give any Information or Evidence against, seise, or
o Justice any Person offending against the said Act; then all Persons so assembling them-
and their Aiders and Abettors, shall be adjudged guilty of Felony, and may be transport-
be Courts before whom they shall be convicted for seven Years, upon the like Terms as
cted by 4 Geo. 1. c. 11 and 6 Geo. 1. c. 23.
on the Commission of Felony, looking on without using any Means to take the Page 125. N° [81]
is punishable as Misprision of Felony. 1 *H. H. P. C.* 431, 448, 449, 533.
H. P. C. 75, 76. See also *B.* 2. *Ch.* 12. *sect.* 1.
2 Geo. 2. c. 24. for preventing Bribery and Corruption in the Election of Mem- Page 170. N° [82]
Parliament, it is enacted, That every Elector shall take an Oath, if demanded, that
not received any Reward, Promise, &c. for his Vote, which Oath the presiding Officer
dminister under the Penalty of 50l. And the returning Officer admitting an Elec-
poll, before taking the demanded Oath, forfeits 100l. Also it is enacted, That the re-
Officer shall immediately after Reading the Writ take an Oath that he has received no
rd, &c. for making a Return. And the returning Officer or Electors convicted of
y shall suffer all the legal Penalties of Perjury, and be incapable of voting at any
n for Members of Parliament; and Persons having or claiming to have a Vote,
king any Reward to vote or to forbear voting, forfeit 500l. and shall be disabled from
at any Election of Members of Parliament, and shall also be disabled to hold any Of-
Franchise, to which they are, or may afterwards be entitled, as if they were naturally
And every Officer, to whom the Execution of any Writ for electing Members of Par-
t does belong, for every wilful Offence against this Act shall forfeit 50l.
. 9 Geo. 2. c. 35. sect. 24. If any Person shall offer any Bribe to any Officer of the
s or Excise, to do any Act whereby his Majesty might be defrauded in his said Re-
every Person shall for every such Offence, forfeit 50l.
. 2 Geo. 2. c. 25. sect. 2. Any Person guilty of wilful Perjury or Subornation Page 182. N° [83]
jury may (besides the Punishment already inflicted by Law for such Crimes) be sent to
use of Correction, or be transported for a Term not exceeding seven Years; and if
erson so committed or transported shall voluntarily escape or break Prison, or return
Transportation before the Expiration of his Term, such Person shall suffer as a Felon
t Benefit of Clergy.
. 10 Geo. 2. c. 26. sect. 18. If any Prisoner or other Person enabled to take the Be- Page 182. N° [84]
this Act (for the Relief of Insolvent Debtors) shall be convicted of wilful Perjury,
of the Matters in this Act mentioned; he shall suffer as a Felon without Benefit of
y.
. 2 Geo. 2. c. 25. sect. 1. If any Person shall forge or procure to be forged, or assist Page 187. N° [85]
ging any Deed, Will, Testament, Bond, Writing obligatory, Bill of Exchange,

Promiſſory Note for Payment of Money, Indorſement or Aſſignment of any Bill of Exchange or Promiſſory Note for Payment of Money, or any Acquittance, or Receipt for Money or Goods; or ſhall utter or publiſh as true any forged Deed, Will, &c. *knowing the ſame to be forged, with an Intent to defraud any Perſon; every ſuch Offender ſhall be guilty of Felony without Benefit of Clergy.*

Page 187. N° [86] Stat. 7 Geo. 2. c. 22. *If any Perſon ſhall falſely make, alter or forge, or procure to be falſely made, altered,* &c. *or aſſiſt in falſely making,* &c. *any Acceptance of any Bill of Exchange, or the Number or principal Sum of any accountable Receipt for any Note, Bill, or other Security for Payment of Money, or any Warrant or Order for Payment of Money, or Delivery of Goods, or ſhall utter or publiſh any ſuch falſe Acceptance, Bill, Receipt,* &c. *with Intent to defraud any Perſon; every ſuch Offender ſhall ſuffer as a Felon without Benefit of Clergy.*

Page 216. N° [87] Stat. 5 Geo. 1. c. 12. ſect. 1. *No Waggon travelling for Hire ſhall be drawn with more than ſix Horſes, and no ſuch Cart with more than three, on Pain of forfeiting all Horſes above ſix in a Waggon, and three in a Cart, with all the Accoutrements, to the Uſe of him who ſhall ſeiſe the ſame.*

Sect. 2. *And the Perſon who ſhall make ſuch Seiſure ſhall deliver the Things ſo into the Cuſtody of the Conſtable, or other pariſh Officer of the ſame or adjacent Town Pariſh, (who are hereby required ſafely to keep the ſame) till the Perſon who made ſuch ſtreſs ſhall make Proof upon Oath before ſome Juſtice of the Peace of the Offence committed, and the ſaid Juſtice is hereby required to iſſue his Precept to the ſaid Officer to deliver Things ſo forfeited to the Party who ſeiſed the ſame for his ſole Uſe, paying ſuch reaſonable Charge for the keeping,* &c. *as the ſaid Juſtice ſhall allow.*

Sect. 3. *No ſuch travelling Waggon, having the Wheels bound with Streaks or Tires of a leſs Breadth than two Inches and a half, when worn, or being ſet on with roſe-headed Nails, ſhall be drawn with more than three Horſes, on Pain of forfeiting all but three,* &c.

Sect. 4. *And if any Perſon ſhall hinder or attempt to hinder the Seiſing, or carry away any Seiſure, for any Forfeiture in this Act, or ſhall reſcue the ſame, or uſe any Force to the Perſon making ſuch Seiſure, ſuch Perſon ſhall upon Proof, made by Oath before one Juſtice of the Peace for the County wherein ſuch Offence is done, be committed to the Common Gaol for three Months without Bail, and ſhall forfeit ten Pounds to be levied by Diſtreſs.*

Sect. 5. *Provided nothing in this Act ſhall extend to ſuch Waggons, Carts or Carriages as ſhall be employed about Husbandry, or in carrying of Cheeſe, Butter, Hay, Straw, unthraſhed, Coals, Chalk, or any one Tree or Piece of Timber, or any one Stone, or Block of Marble, Carravans, and the covered Carriages of Noblemen and Gentlemen, for their own private Uſe, or ſuch Timber, Ammunition or Artillery as ſhall be for the Service of his Majeſty, his Heirs and Succeſſors.*

Page 220. N° [88] On this Subject of Highways, ſee alſo the *Stat.* 1 *Geo.* 1. *c.* 52. for making Laws for repairing the Highways more effectual. *Stat.* 6 *Geo.* 1. *c.* 6. for preventing the Carriage of exceſſive Loads of Meal, Malt, Bricks and Coal within ten Miles of *London* and *Weſtminſter*. *Stat.* 7 *Geo.* 2. *c.* 9. to oblige Poſſeſſors of Lands to cut and keep low ſuch Hedges as are adjoining to the Highways. *Stat.* 9 *Geo.* 2. *c.* explaining and amending the Clauſe in 1 *Geo.* 1. *ſtat.* 2. *c.* 52. relating to Scotland.

Page 230. N° [89] By 2 *Geo.* 2. *c.* 28. *ſect.* 11. it is enacted, *That no Licence ſhall be granted to any Perſon to keep a common Inn or Alehouſe, or to retail Brandy,* &c. *but at a General Meeting of the Juſtices of Peace, acting in the Diviſion where the ſaid Perſon reſides, to be holden for that Purpoſe.*

BRITISH MUSEUM 48 DEC

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What an Entry within these Statutes. One shall not be said to make an Entry by a bare Agreement, (ch. 64. sect. 24.) or without some Claim, express or implied, (ch. 64. sect. 20.) but without an actual Ouster he may, (ch. 64. sect. 21.) or by a bare Continuance in Possession, (ch. 64. sect. 23.) or by accompanying the principal Party, ch. 64. sect. 22.

D.

What Force is required to make an Entry forcible. No Entry can be adjudged forcible, but only either in respect of some Act of Violence, as beating the Possessor, or breaking open Doors, &c. (ch. 64. sect. 26. or in respect of some Terror by Th... of some bodily Hurt) whether by one or more, ... usual Armour, or Number of Servants, &c. ch. ... sect. 27, 28, 29.

E.

A Detainer may be forcible in respect of the like Threats, Numbers, or Arms, as will make an Entry forcible; or in respect of shutting one's Doors against a Justice, but not from a bare Refusal to go ... a House, ch. 64. sect. 30.

F.

Ecclesiastical as well as Temporal Possessions are within these Statutes; also one may be guilty of a forcible Detainer of any Possession, but not of a bare Easement, and he may be guilty of a forcible Entry of any Possession, Writ of Entry lies, ch. 64. sect. 31.

G.

None can be guilty in respect of Land, whereof he himself hath the sole lawful Possession, and another the bare Custody, (ch. 64. sect. 32.) but a Joinetenant ... guilty, (ch. 64. sect. 33.) so may every Per... has a defeasible Possession, (ch. 64. sect. 34.) ... may an Infant or Feme-Covert acting in the ... Persons, and not barely commanding others, ch. ... sect. 35.

H.

The Caption of the Indictment needs only shew, That the Justices before whom it was taken, were Justices of Peace, ch. 64. sect. 36.
The Possession wherein the Force was committed must be certainly described and is not sufficiently ascertained by the word Tenement, or a disjunctive Expression of Things of different Natures, ch. 64. sect. 37.
An Indictment on 15 *R.* 2. needs only shew, That some Person was in Possession; but an Indictment on 8 *H.* 6. must shew, That the Party had a ... on 21 *Jac.* 1. That he had a Term ... ch. 64. sect. 38.
A Repugnancy in such an Indictment is a fatal Fault, as where it sets forth a Disseisin of a Lessee for Years, or of one who is said to have been always in ... 64. sect. 39.
An Indictment on 15 *R.* 2. must shew, That both the Entry and Detainer were forcible, but an Indictment of 8 *H.* 6. needs only shew, That one of them was so, ch. 64. sect. 40.
No Indictment can Warrant a Restitution, unless it shew a Continuance of the Ouster, ch. 64. sect. 41.
The Ouster shall be intended to have been at the same Time and Place with the Entry, without adding *adtunc & ibidem*, ch. 64. sect. 42.

…tè ex- …inde. The Words *Illicite expulit* and *inde*, are implied in the Word *Diſſeiſivit*, ch. 64. ſect. 43.

…t Armis, …laint. It is neither neceſſary to have the Words *Vi & Armis*, or to expreſs a Complaint to the Juſtice, ch. 64. ſect. 44.

I.

…ation, of Poſſeſ- …and to Reſtitution can be awarded only of Tenements viſible and corporeal, (ch. 64. ſect. 45.) and to one, who was ſeiſed of an actual Freehold, (ch. 64. ſect. 46.) which alone ſeems neceſſary, …ether it were by Right or Wrong, ch. 64. ſect. 47.

K.

…hom. Reſtitution can't be awarded by any Juſtices but thoſe before whom the In…ment was found, or the King's Bench, ch. 64. …. 49, 50, 51.

The Sheriff may raiſe the *Poſſe* to execute it, ch. 64. ſect. 52.

L.

…ree …Poſſeſ- The three Years Poſſeſſion, which ſhall bar a Reſtitution, muſt have an uninterrupted Continuance, (ch. 64. ſect. 53.) and regularly ought to be lawful, …64. ſect. 54.) but perhaps does not neceſſari…equire that the firſt Entry was peaceable, ch. 64. …55.

…llegation of it ſtops Reſtitution till it be tried, …t ſhew not any Title or Eſtate, ch. 64. ſect. 56. …the Day of the Indictment, and before the In…ment, in 31 *El.* 11. have the ſame Meaning, ch. …ect. 57.

Alſo Reſtitution muſt be ſtayed till the Defendant have Notice of the Charge againſt him, (ch. 64. ſect. 60.) and …. if he appear and tender a Traverſe, it muſt ſtay till ſuch Traverſe be tried, …64. ſect. 58.) and ſo much found as will warrant …ſtitution, ch. 64. ſect. 59.

It can be ſuperſeded by no Juſtices, ex…eas. cept ſome of thoſe before whom the Indictment was found, or the King's Bench, ch. 64. ſect. 61, 62.

…ution. The King's Bench may grant a Re…reſtitution to the Defendant, upon the …nableneſs of his Caſe, conſidered in its whole …mſtances, but is not bound to do it, *ex Rigore* …, ch. 64. ſect. 63, 64, *&c.*

…er Matters. See **Homicide, C.**

Forcible Marriage. See **Marriage.**

Foreign.

…hall be ſaid to be a foreign Nation, ch. 17. ſect. …See **Foreſtalling, B.**

Foreſtalling.

A.

…ſhed …mon All endeavours to raiſe the Price of Merchandize, come under the Notion of Foreſtalling at Common Law, (ch. 80. ſect. 1, 2.) which was anciently …ed with Pillory, and always with Fine and …ſonment, ch. 80. ſect. 5.

B.

By Statute its Notion is confined to the Foreſtalling a Fair, or Market, (ch. 80. ſect. 12.) and it is puniſhed with two Months Impriſonment, and the Forfeiture of the Value of the Goods, *&c.* ch. 80. ſect. 21, 22. *How by Statute.*

It is unlawful to foreſtal many Things which it is lawful to engroſs, as Barley for Malting, (ch 80. ſect. 25.) Fiſh, (ch. 80. ſect. 32.) Victual bought by a Victualler, (ch. 80. ſect. 36.) Corn bought to be tranſported from one Part of the Realm to another, ch. 80. ſect. 39.) Cattle bought by a Drover, (ch. 80. ſect. 40.) or by a Badger, *&c.* (ch. 80. ſect. 41.) Proviſion for Shipping, (ch. 80. ſect. 43.) But it is not made unlawful by Statute to foreſtal Sea-Fiſh unſalted, (ch. 80. ſect. 33.) or foreign Victuals, ch. 80. ſect. 35. See **Information.** *In ſome Caſes unlawful, where Engroſſing is lawful.*

Forfeiture.

No Forfeiture of Lands or Goods for Hereſy, ch. 2. ſect. 10.

The Limitation of it to the King in a Statute is mere Surplus, ch. 10. ſect. 33.

When ſaved by Death, ch. 7. ſect. 6.

The Forfeiture of a Deodand, or of the Goods of a *Felo de ſe*, ſhall relate to the Stroke, and can be ſaved by no Alienation, ch. 26. ſect. 7. ch. 27. ſect. 10.

But it may be ſaved by a Pardon before the Inquiſition, ch. 26. ſect. 8. ch. 27. ſect. 9. 10.

Forgery.

A.

What ſhall be ſaid to be Forgery at Common Law, ch. 70. ſect. 1.

Forgery in making an antedated Deed, ch. 70. ſect. 2. *Forgery at Common Law.*

In making a Will, or inſerting Legacies in it without Direction, ch. 70. ſect. 2, 5.

By fixing another's Hand or Seal to a Writing without his Privity, ch. 70. ſect. 2, 3.

By inſerting into an Indictment the Names of thoſe againſt whom it was not found, ch. 70. ſect. 2.

By making a material Alteration of a true Deed, ch. 70. ſect. 2.

No Forgery to write a Deed in another's Name by his Command, ch. 70. ſect. 3.

An Alteration of a Deed prejudicial to none but him who makes it, no Forgery, ch. 70. ſect. 4.

A bare Nonfeaſance, no Forgery, except in ſpecial Caſes, ch. 70. ſect. 6.

Forgery of a Writing, which if it were a true one, would be of no Validity, ch. 70. ſect. 7.

Forgery of Records, ch. 70. ſect. 8.

---- Of other authentick Writings, ch. 70. ſect. 9.

---- Of Deeds or Wills, ch. 70. ſect. 10.

---- Of Writings of an inferior Nature, ch. 70. ſect. 11. *Forgery by Statute.*

B.

Forgery or Publication of any falſe Deed or Will, whereby any Freehold or Copyhold ſhall be moleſted; how puniſhed for the firſt Time, ch. 70. ſect. 12.

Forgery or Publication of a falſe Writing concerning a Term for Years, Annuity, or Releaſe of a Thing perſonal, how puniſhed for the firſt Time, ch. 70. ſect. 13.
The ſecond Offence, Felony, ch. 70. ſect. 14.
By what Juſtices theſe Offences are to be determined, ch. 70. ſect. 15.
Spiritual Courts in no Danger of the Statute from proving a falſe Will, ch. 70. ſect. 16.

C.

Expoſitions on the Statute. A falſe Cuſtomary is within the firſt Branch, (ch. 80. ſect. 17.) So alſo is a forged Leaſe for Years in the Name of one ſeiſed of an Inheritance, but not a forged Leaſe in the Name of a Leſſee, ch. 70. ſect. 18.
A forged Will in the Name of a Leſſee for Years, is within the ſecond Branch, ch. 70. ſect. 19.
Forgery relating to Lands in *Ireland*, (ch. 70. ſect. 20.) or purporting a Gift of perſonal Goods, (ch. 70. ſect. 21.) or of a Statute Staple, (ch. 40. ſect. 22.) is no way within the Statute, but the Forgery of a Statute-Merchant is, ch. 70. ſect. 22.
He that is informed of a Forgery can't ſafely publiſh the Deed, tho' he do not know it to be forged, ch. 70. ſect. 22.
The Damages to the Party grieved by a Releaſe of a Bond, to be governed by the Penalty, ch. 70. ſect. 24. See **Indictment, Conviction, Offence.**

Frauds. See Cheats.

Fraus Legis.

The Law not to be evaded by a Fraud, ch. 33. ſect. 8, 10. ch. 38. ſect. 5. ch. 73. ſect. 5. See **Evaſion.**

Freehold.

No Larceny in taking Things annexed to it, ch. 33. ſect. 21.

Freſh Suit. See Riots, E.

Game-houſes.

COmmon Game-houſes indictable as Nuſances, ch. 75. ſect. 7.

Gaoler.

May juſtify killing a Criminal endeavouring to eſcape, ch. 28. ſect. 12.
Guilty of Felony for compelling Perſons to become Appellors, ch. 51.
Not to be aſſaulted for doing their Duty, ch. 21. ſect. 14.
How puniſhable for miſuſing a Priſoner, *&c.* ch. 66. ſect. 2.

Gate.

In a Highway, how far a Nuſance, ch. 75. ſect. 9. ch. 76. ſect. 50.

General Iſſue. See Special Pleading.

God.

Denying any Perſon in the Trinity to be God, or affirming, that there are more Gods than one, how puniſhable, ch. 2. ſect. 11.
Denying God's Being or Providence, how puniſhable, ch. 5. ſect. 1.

Gold. See Coin.

Goldſmith.

Bullion to be exported muſt be marked in Goldſmiths Hall, *&c.* ch. 18. ſect. 3.
None but Goldſmiths or Refiners to buy or ſell Bullion, ch. 18. ſect. 5.

Goods.

What are mere perſonal Goods, ch. 33. ſect. 21. See **Larceny, D.**
The Import of the Forfeiture of Goods in a Statute, ch. 10. ſect. 15.
The King may ſeiſe a Recuſant's Goods, but cannot grant them over without an Inquiſition, ch. 10. ſect. 46.

Government. See Contempts, D.

Gun-Powder.

Lawful for any one to import it, ch. 79. ſect. 21.

Grand-Jury.

Cannot find Part of a Bill true, and Part falſe, ch. 14. ſect. 40, 59.

Grant. See Goods, ch. 10. ſect. 46.

Gravel.

Where the Surveyor of the Highway may dig for it, ch. 76. ſect. 39, 40.

Gueſt.

Where guilty of Larceny, ch. 33. ſect. 6, 18.

Habeas Corpus.

FOR one committed for Hereſy, ch. 2. ſect. 7.

Hackney-Coachmen.

Permitted to work on a Sunday, ch. 6. ſect. 3.

Heretico Comburendo. See Hereſy.

Hawks.

Where it is Felony to ſteal them, or their Eggs, ch. 33. ſect. 23, 26, 27.

Hedges. See Highways, I.

Heir.

How far a Recuſant's Heir is chargeable for his Anceſtor's Forfeiture, ch. 10. ſect. 55, 56.
Heir apparent may maintain his Anceſtor, ch. 84. ſect. 13, 14.

Hereſy.

What Errors are to be eſteemed heretical, ch. 2. ſect. 2.

Juriſdiction of the Convocation over Hereſy and ereticks, ch. 2. ſect. 3.
Juriſdiction of Archbiſhops, (ch. 2. ſect. 5.) Biſps, and other Spiritual Judges, ch. 2. ſect. 4.
poral Courts no otherwiſe to meddle with it than it cauſes Sedition, (ch. 2. ſect. 6.) or as a Sub- is unlawfully impriſoned under Pretence of it, 2. ſect. 7.) or as it is pleaded in a *Quare Impedit*, 2. ſect. 8.
er Caſes no Remedy but by Appeal, ch. 2. ſect. 9.
ntly Hereticks and Sorcerers might be burnt by Writ *de Hæretico comburendo*, but not at this y, ch. 2. ſect. 10, 11. ch. 3. ſect. 2. See *For-ure.*

Highway.

A.

is a Any Cart, Horſe, or Footway, com-
way. mon to all People, a Highway, and ſuch Cartway is the King's Highway, ther it directly lead to a Market-Town, or not, 76. ſect. 1.
in an open Field near a Highway, how far of it, ch. 76. ſect. 2.
ay, not to be changed without a Writ of *Ad Damnum*, (ch. 76. ſect. 3.) or the Act of God, 76. ſect. 4.

B.

m re- To be repaired by the Pariſh of common
t Right, and Ditches to be ſcowred by
Law. the Ter-tenants of the Lands adjoining, ch. 76. ſect. 5.
To be repaired by particular Perſons, in
e. reſpect either of an Incloſure of Lands
ining, which obliges the Land-Owner to make new Way a perfect good Way, (ch. 76. ſect. 6, 7.) or of a Preſcription, which
ption. may bind any private Perſon to ſuch Repairs in reſpect of a ſpecial Tenure of Lands, and a Corporation aggregate, without any ſuch ſpecial Reaſon, ch. 76. ſect. 8, 9.

C.

m, by Every Occupier of fifty Pounds *per Annum*, (ch. 76. ſect. 13.) or Keeper of
rs of a Draught, ſhall ſend a Cart to the Repairs of the Highways, and every
rs. Labourer muſt work in Perſon, ch. 76. ſect. 10.
worth 5 *l.* in Goods, or 40 *s.* a Year in Land, ſend two Men, ch. 76. ſect. 11.
who have a Plough-land in ſeveral Pariſhes, are geable only where they live, ch. 76. ſect. 12.
In Countreys where there is no uſe of Carts, Horſes muſt be employed, *&c.* ch. 76. ſect. 14.
en. Holy Orders, no Exemption from ſuch Repairs, ch, 76. ſect. 15.
Several Teams muſt be ſent for ſeveral Draughts, ch. 76. ſect. 16.
Owners Owners of Lands not ſuffering them to be occupied, may be charged, ch. 76. ſect. 17.
ent. Doing the whole required by Statute, no Plea to an Indictment at Common Law, ch. 76. ſect. 18.

Sufficient for the Keeper of a Draught to ſend ſuch Horſes as he has, ch. 76. ſect. 19.

D.

Inhabitants, and Occupiers of Lands in a Pariſh, how taxable to the Repairs of the Highways, ch. 76. ſect. 20, 22. *Aſſeſſments.*
The whole Pariſh taxable to the Repairs of a Vill, ch. 76. ſect. 21.

E.

Fines for not Repairing the Highways, to be applied to ſuch Repairs, (ch. 73. ſect. 23, 24.) And Lands ſettled in Truſt for ſuch Repairs are to be let at the improved Rent, ch. 76. ſect. 25. *Fines.* *Truſt.*

F.

Highways to be enlarged and cleared from Dykes and Trees, and Buſhes, for 200 Foot on each Side, ch. 76. ſect. 26. *Enlargement of Highways.*
Cartways to be made eight Foot broad, (ch. 76. ſect. 27.) Horſe Cauſeys three Foot, ch. 76. ſect. 28. *Cartway*, *Horſe Cauſey.*
Quarter-Seſſions may enlarge Highways to eight Foot Breath, by taking in Ground, and making Aſſeſſments for the Satisfaction of the Owners, *&c.* (ch. 76. ſect. 29, 30.) who muſt have Notice to appear at Seſſions, (ch. 76. ſect. 31.) and ſhall have Time to cut down their Timber, (ch. 76. ſect. 32.) and may appeal to Aſſizes, ch. 76. ſect. 33. *Enlargement by Order of Seſſions.*

G.

Surveyors of the Highways are to be nominated by a ſpecial Seſſions, out of a Liſt of the Inhabitants, and are bound to ſerve, under Pain of 5 *l.* and if the firſt Nominees refuſe, others are to be appointed in like Manner, (ch. 76. ſect. 35.) And the Juſtices neglecting to make ſuch Nomination, forfeit 5 *l.* ch. 76. ſect. 36. *Surveyors, how appointed.*

H.

Surveyors muſt view the Highways every four Months, and make a Preſentment of their Condition to a Juſtice, and give Notice of Annoyances in the Church, and if they be not removed by the Parties, may remove and diſpoſe of them, and ſhall be reimburſed their Charges by the Parties, ch. 76. ſect. 37. *How they are to execute their Office.*
Alſo they muſt appoint ſix Days for the Repairs of the Highways, and give Notice thereof in the Church, and return the Defaulters to ſome Juſtice, who ſhall preſent them at the Quarter-Seſſions, ch. 76. ſect. 38. *Six Days.*
Alſo they may take broken Stones from Quarries, and dig for Gravel, *&c.* under certain Reſtrictions, ch. 76. ſect. 39, 40. *Stones and Gravel.*
And they may turn a Watercourſe into the Grounds adjoining, ch. 76. ſect. 41. *Watercourſes.*
And they may make Sluices thro' Banks in Highways, (ch. 76. ſect. 42.) and may make new Ditches, ch. 76. ſect. 43. *Sluices.*
They ſhall be re-imburſed their own Money laid out in ſuch Repairs, by a *Re-imburſment.*

Rate, (ch. 76. ſect. 22.) And ſhall receive all Fines for not Repairing the Highways, ch. 76. ſect. 23.

Special Seſſions. They muſt duly execute all Parts of their Office, and make true Preſentments concerning the Highways to the ſpecial Seſſions, and give true Accounts, &c. under ſevere Penalties, ch. 76. ſect. 44, 45, 46, 47, 70.

Forfeitures.

I.

Nuſances. A Ditch overthwart a Way, (ch. 76. ſect. 48.) or kept foul, (ch. 76. ſect. 50.) or Boughs of Trees hanging over it, (ch. 76. ſect. 50.) are Nuſances at Law.

Excuſe. No Excuſe for laying Logs in it, that there is a winding Paſſage thro' them, ch. 76. ſect. 49.

But Neceſſity excuſes the unlading Billets in a Street, ch. 76. ſect. 49.

Ditches and Hedges. Owners of Lands adjoining to Highways to ſcowr their Ditches, cut their Hedges, and lop their Trees, &c. under ſeveral Penalties, ch. 76. ſect. 52, 53, 54, 55, 56, 57.

Trees and Buſhes. Trees and Buſhes to be removed from Highways, ch. 76. ſect. 58, 59, 60.

Soil, Dung, &c. No Soil, (ch. 76. ſect. 62.) Stone, Timber, Straw, or Dung, to be laid in a Highway, ch. 76. ſect. 61, 62, 63.

Poſts not to be removed. No Poſt, Stone, or other Thing ſet up for the Security of the Highway to be removed, &c. ch. 76. ſect. 64.

K.

Proceedings againſt Offenders. In what Manner the Leet, or in its Default the Quarter-Seſſions, are to proceed againſt Offences relating to the Highways, ch. 76. ſect. 67.

Fines. How the Fines are to be eſtreated, aſſeſſed, levied, and accounted for, ch. 76. ſect. 67, 68, 69, 70, 73.

Preſentments. Surveyors muſt preſent all Offences of this Kind, ch. 76. ſect. 70. *ſupra* Letter H.

A Juſtice of Peace may preſent all ſuch Offences of his own Knowledge (ch. 76. ſect. 71.) and it is a Queſtion whether ſuch Preſentment be traverſable, ch. 76. ſect. 72.

Courts. In what Courts ſuch Offences may be determined, ch. 76. ſect. 74.

Day's Work. The next Juſtices may puniſh the Failure of the Day's Work, ch. 76. ſect. 76, 76.

Indictments for ſuch Offences to be determined in the proper Counties, and not removed by *Certiorari*, ch. 76. ſect. 78, 79.

Certiorari.

Yet the Juſtices under this Pretence ſhall not be ſuffered to exceed their Juriſdiction, ch. 76. ſect. 80.

Six Months. Proſecutions muſt be within ſix Months, ch. 76. ſect. 81.

The Defendant ſhall have Notice of all ſuch Proſecutions, (ch. 76. ſect. 83.) and be admitted to traverſe any ſuch Indictment except in the Court-Leet, ch. 76. ſect. 83, 84.

L.

Form of Indictment. In ſuch Indictments it is ſafeſt to ſhew a *Locus a quo & ad quem*, ch. 76. ſect. 86.

A Place muſt be ſhewn in which the Nuſance was done, ch. 76. ſect. 87.

The Length and Breadth of the way muſt be certain alledged, ch. 76. ſect. 88.

The Way muſt appear to be common, ch. 76. ſect.

In an Indictment againſt a particular Perſon, the muſt be ſpecially ſet forth, (ch. 76. ſect. 90.) and Defendant muſt be ſpecially charged, ch. 76. ſect.

For diverting a Highway not good, ch. 76. ſect.

Vi & Armis not neceſſary, ch. 76. ſect. 92. See

M.

Difference between an Aſſault in the Highway and in a Town, ch. 28. ſect. 25.

Aſſault in Highway.

Higler.

Not to travel on a Sunday, ch. 6. ſect. 3.

Holiday.

Forfeiture for Abſence from Church on ſuch Da

Church, A.

Homicide.

What it is, ch. 26. ſect. 2.

A.

Juſtifiable Homicide muſt be thro' Neceſſity wholly without Fault, (ch. 28. ſect. 1.) and muſt have no Malice covered with Pretence of Neceſſity, ch. 28. ſect. 2.

According to ſome Books it may be pleaded ſpecially, ch. 28. ſect. 3.

B.

Where it happens in the Execution of Juſtice, the Court muſt have a Juriſdiction, ch. 28. ſect. 4, 5, 6.

And the Execution muſt be by the proper Officer, (ch. 28. ſect. 7, 8, 9.) and warranted by the Judgment, ch. 28. ſect. 10.

C.

Where one may juſtify the Killing of a Felon, though he be not indicted, (ch. 28. ſect. 11.) or of an innocent Perſon if he be indicted, if he fly from Juſtice, (ch. 28. ſect. 12.) or of one who Aſſaults his Gaoler, (ch. 28. ſect. 13.) or of a Rioter, or forcible Enterer, &c. (ch. 28. ſect. 14.) or of a Treſpaſſer in a Park, (ch. 28. ſect. 15.) or of one who fights a Combat allowed by Law, ch. 28. ſect. 16.

D.

How far the Sheriff may juſtify the killing of one, who will not ſuffer himſelf to be arreſted by civil Proceſs, ch. 28. ſect. 17, 18, 19, 20.

E.

Generally one may juſtify killing one, who attempts to commit a Felony, (ch. 28. ſect. 21.) yet the Party him-

lf muſt be wholly without Fault, (ch. 28. ſect. 22.) or can any one juſtify killing another in defending imſelf from a bare Treſpaſs, (ch. 28. ſect. 23.) either is it clearly ſettled, that a Man may juſtify illing another, who attempts to kill him, ch. 28. ct. 23, 24.

F.

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